
(2001) 11 PAT CK 0051
In the Patna High Court
Case No : C.W.J.C. No. 3159 of 2001

Nageshwar Prasad and Others

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 23-11-2001

Acts Referred:

Citation : (2001) 11 PAT CK 0051

Final Decision : Dismissed

Judgement

Radha Mohan Prasad, J.—In this writ petition, the petitioners who claim to be the voters of Sitamarhi Assembly Constituency No. 67, have prayed for issuance of writ of quo warranto or any other writ or direction commanding Sahid Ali Khan (respondent No. 4) to vacate the seat of Bihar Legislative Assembly representing said Sitamarhi Assembly constituency and have further prayed to declare the said seat of the Bihar Legislative Assembly as vacant and to award suitable punishment to respondent No. 4 for usurping the post of M.L.A. in flagrant disregard of the provisions of the Representation of the People Act, 1951 (hereinafter referred to as "the R.P. Act") and the Constitution of India.

2. The facts of the case lie in a very narrow compass. Respondent No. 4 contested the election in question and was declared elected by a margin of 35 votes as a member of Rastriya Janata Dal. It is stated that Patna Industrial Area Development Authority (hereinafter referred to as "the PIADA") was constituted by virtue of Notification No. S.O. 908 dated 27-6-1973, vide Annexure-1, by the Governor of Bihar in exercise of power conferred under Sub-section (1) of Section 3 of the Bihar Industrial Area Development Authority Ordinance, 1973 (Bihar Ordinance No. 42 of 1973) which subsequently was replaced by Bihar Act 16 of 1974, a copy of which has been annexed as Annexure-2. It is alleged that respondent No. 4 by virtue of his being inevitable supporter for the ruling Rastriya Janata Dal party got himself appointed as the Chairman of the PIADA, vide Notification No. 11328, dated 4-9-1991, a copy of which has been annexed as Annexure-3. According to the petitioners, respondent No. 4 not only got

himself appointed as Chairman of the PIADA but also managed to get the benefits available to a Minister of State by virtue of notification dated 15-11-1991 of the Department of Parliamentary Affairs of the State of Bihar, a true copy of which has been annexed as Annexure-4.

3. It is stated that since after 4-9-1991, respondent No. 4 continued to remain as the Chairman of PIADA and derived the benefits including salary and allowances admissible to a State Minister till date, which is evident from letter No. 252 Stha. dated 8-3-1999 (Annexure-5). It is also stated that from the aforesaid letter (Annexure-5), it would appear that respondent No. 4 was getting pay of Rs. 2,000/- per month, regional allowance at the rate of Rs. 6,000/- per month, besides Rs. 1,500/- per month as guest allowance with effect from 30-4-1998 i.e., before his election to the Assembly in the year 2000 and is still getting the said benefits. In addition to the above, he was getting free furnished accommodation, free electricity, a hierarchy of staff and Rs. 1,500/- per month as conveyance allowance. However, by virtue of Parliamentary Affairs Department Notification No. 269, dated 11-3-1999 (Annexure-6), the State Government withdrew the benefits and privilege of the State Minister available to respondent No. 4 with effect from 12-2-1999, but by subsequent Notification No. 351 dated 13-5-1999 (Annexure-7), notification dated 11-3-1999 (Annexure-6) was recalled and it was ordered that respondent No. 4 will continue to avail the benefits and privileges available to a Minister of State with retrospective effect from 12-2-1999.

4. In the counter-affidavit filed on behalf of the State of Bihar (respondent No. 1), it is stated that the facts are either matter of records or that it relates to PIADA. However, with respect to letter No. 269 dated 11-3-1999 (Annexure-6) and letter No. 351, dated 13-5-1999 (Annexure-7), it is stated that they were not issued by the Department of Parliamentary Affairs, rather were issued by the PIADA. According to the State, the Parliamentary Affairs Department had issued letter No. 132, dated 26-2-1999 withdrawing the status and privileges of Ministers and the State Ministers to the Chairperson of Boards/Nigam/Parishad/Samities/Pradhikar, etc. but later the department issued Notification No. 211, dated 27-3-1999 recalling the earlier Notification No. 132, dated 26-2-1999, a photo copy of which has been annexed as Annexure-B.

5. A counter-affidavit has also been filed on behalf of respondent No. 4 in which it is stated that the writ petition seeking relief of quo warranto is neither maintainable in law nor on facts. The petitioners who claim to be the voters of said Constituency, never raised this issue before any forum though respondent No. 4 is fighting election since 1990 and has been Chairman of the Authority since 1991. It is alleged that the petitioners have been set up by a defeated candidate Shri Hari Shankar Prasad of the Assembly Election of 2000, who has already filed an election petition in this Court, being E.P. No. 1 of 2000, challenging the election of respondent No. 4 and the evidence in it is going on. According to the said respondent, Article 329(b) of the Constitution bars the

challenge of an election except by election petition presented to such authority and in such manner as may be provided for or under any law made by the appropriate Legislature.

6. With respect to disqualification, as alleged by the petitioners, it is stated that it requires evidence, which is not possible in the writ jurisdiction and cannot be decided merely on affidavits. On merits, it is stated that Articles 102(a) and 191(1a) of the Constitution were incorporated with a view to eliminate or in any event reduce the risk of conflict between the duties and interest amongst member of the Legislature so as to ensure that the Legislature concerned does not come under an obligation of the executive on account of receiving pecuniary gain or profit from it which may render him amenable to influence of Executive, while discharging his obligation as a Legislature.

7. The PIADA has been constituted by virtue of Notification No. S.O. 908 in exercise Of the power conferred u/s 3 of Sub-section (1) of the Bihar Ordinance No. 42 of 1973, later converted into an Act. From reading of the said Act, it is evident that the aims and object of the said Act is to provide for plan development of industrial areas and promotion of Industries and the matter pertainment thereto. The power and function of the Authority has been enumerated under the provisions of the Act and the duties of the Chairman/Vice-Chairman of an undertaking/Authority/Corporation have been mentioned in the letter dated 27th January, 1981 issued by the Chairman of the Bureau of Public Enterprises, Bihar, Patna. A photo copy of the said letter has been annexed as Annexure-A to the said counter-affidavit. It is stated that under the Act neither allowances nor any honorarium or any salary has been fixed of the office of the Chairman of the Authorities. According to the said respondent, there is no control of the State Government over the functioning of the Authority nor there is any financial power granted by the Government of Bihar. In paragraph 32 of the counter-affidavit, it is stated that "it is not correct to say that respondent No. 4 is holding the office of profit under the State Government. Respondent No. 4 is not getting pecuniary gain/benefit and other material benefit by holding that office. He has been given the status of State Minister and by virtue of getting the status of State Minister he is getting compensatory allowance. In paragraph 34, it is stated that "it is not correct to say that the pay, allowance, salary as well as other expenditure is borne out from the State exchequer. Section 7 of the Act speaks about fund of the Authority." In paragraph 37, it is stated that "the respondent by virtue of status of State Minister is availing the facilities and by reason only that his status is Minister of State will not be deemed to hold the office of profit under the Government." Again in paragraph 38, the said respondent has specifically denied that he is holding the office of profit under the State Government and that he was disqualified to contest the election. The said respondent has also stated that prior to his appointment as Chairman of the Authority, three M.L.As. were also Chairmen of the Authority, namely, S/Shri Prithvi Chandra Kisku, A.P.N. Singh and Prabhu Nath Singh. He has contended that he was duiy elected candidate from the said Assembly Constituency in Bihar

Assembly Election, 2000 and there is no question of declaring the seat vacant.

8. In the rejoinder of the petitioners in reply to the counter-affidavit filed on behalf of the respondent No. 1, it is alleged that in the audit report dated 19-6-1997, respondent No. 4 has been found to have made illegal, unauthorised and irregular handling of the fund of the said Authority for his own gains. Further, it is contended that Section 3(3) clearly stipulates that respondent No. 4 has been appointed by the State Government. In paragraph 8 with respect to denial made by the Government for issuance of Annexure-6 and 7, it is stated that Annexures-A and B testify the fact of its having been issued by the Department of Parliamentary Affairs.

9. In the rejoinder to the counter-affidavit of respondent No. 4, the petitioners have stated that they were not at all aware of the deficiency of respondent No. 4 on account of his being holder of office of profit and hence they did not raise any objection in that regard previously. They have denied about being set up by the defeated candidate Shri Harishankar Prasad and stated that petitioner No. 2 Bhagwan San had even contested election against the father of Shri Prasad in Sitamarhi Assembly Election, 1969. With respect to the assertion of the respondents regarding appointment of other political Chairman (previous M.L.A. as Chairman), it is stated that none of them enjoyed the facilities of salary, perks and privileges as available to a Minister of State and as such, the illustration cannot be of any help to respondent No. 4, who is availing the said facilities of a Minister of State without any statutory protection as envisaged under Article 191(1a) of the Constitution. It is stated that in view of Annexure-5, it is now admitted position that respondent No. 4 is enjoying the privileges and perks as a Minister of State and is also drawing the salary and allowances having free accommodation, free telephone, free electricity of high order and further that fund of the Authority is under the full control of the State Government. According to the petitioners, perusal of the audit report clearly indicates that the fund of the PIADA is under the full control of the State Government. In paragraph 12, it is asserted that respondent No. 4 is drawing salary of Rs. 2,000/- per month free of Income Tax, regional allowance at the rate of Rs. 6,000/- per month, guest allowance up to Rs. 4,000/- per month, which altogether means a monthly payment of nearly Rs. 12,000/- per month and in addition to that, he is also having free accommodation, free electricity, free telephone as well as full reimbursement of expenditure on journey by rail, road or air and absentee allowance. According to them, the pay, perks and privileges enjoyed by respondent No. 4 are such that it is conflicting with the duties as a member of the legislative assembly. The petitioners have asserted that it is wrong to say that respondent No. 4 is only getting compensatory allowance. Annexure-5, which is an uncontroverted document, clearly show that he is getting monthly salary and allowances to the tune of Rs. 12,000/- per month. He has also asserted that the fund of the PIADA is to borne out by the contribution of the State Government and its budget is being approved and controlled by the State Government and all the expenditure of the PIADA are to be audited by the

Accountant-General, Bihar. It is, thus, contended that respondent No. 4 at the time of filing of the nomination for Bihar Assembly Election, 2000 was holding the office of profit and is still holding it.

10. Mr. Mahto, learned Senior Counsel appearing for the petitioners has contended that the very facts that respondent No. 4 was appointed by the State Government and his removal at the pleasure of the Government clearly show that he was/is disqualified for contesting the election to the Legislative Assembly in view of the provisions, contained in Article 191(1)(a) of the Constitution. Thus, according to him, it is a fit case for issuance of a writ of quo warranto commanding respondent No. 4 to vacate the seat of Bihar Legislative Assembly representing from Sitamarhi Assembly Constituency forthwith. He submitted that respondent No. 4 has admitted that he is disqualified and thus, the provision relating to bar to interference, contained in Article 329 of the Constitution, has got no relevance. In support of this, he has relied upon the decision of the Supreme Court in the case of K. Venkatachalam Vs. A Swamickan and Another, . He further submitted that the Supreme Court recently in the case of Shibu Soren v. Dayanand Sahay and Ors. 2001(5) Supreme 193, approved the decision of this Court setting aside the election of Shibu Soren on finding him to be disqualified. He also referred to the decision of the Supreme Court in the case of Brundaban Nayak Vs. Election Commission of India and Another,

11. Mr. Karn, learned Senior Standing Counsel appearing for the Election Commission has submitted that since the election of respondent No. 4 is in question before this Court in Election Petition No. 1 of 2000 and the same is still pending, this Court may refrain from interfering with the election of respondent No. 4 in this writ petition moreso because it is a pre-election dispute and thus can only be examined in an election petition. In this regard he referred to the provisions, contained in Section 81 of the R.P. Act, 1951. He submitted that the alleged disqualification is covered by the provisions, contained in Clause (a) of Sub-section (1) of Section 100 of the R.P. Act, under which election of a returned candidate not qualified on the date of his election or disqualified to be chosen to fill the seat under the Constitution or the Act can be declared void.

12. Mr. Narendra Prasad, learned Senior Counsel appearing for respondent No. 4 has submitted that this writ petition is not maintainable in view of the law laid down by the Constitution Bench of the Apex Court in the case of N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others, . In the said case, the Apex Court has clearly laid down that the law of elections in India does not contemplate that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under Article 226 of the Constitution and another after they have been completed by means of an election petition. According to him, the decision of Apex Court in the case of K. Venkatachalam Vs. A Swamickan and Another, is not at all applicable as in the said case there was no dispute regarding disqualification of the returned candidate. He referred to

paragraph 4 of the said decision. According to him, in the present case, respondent No. 4 seriously disputes that he holds the office of profit under the State Government. Moreover, it does not affect the functioning in the office of the Legislature. It is submitted that in any view of the matter, it requires evidence to show that respondent No. 4 holds office of profit under the State Government. The principle decided in Shibu Soren's case has got no application as in the Jharkhand Area Autonomous Council Act, 1994 (hereinafter referred to as "the Act") itself, scale is prescribed u/s 26. Moreover, in the case of Shibu Soren (supra), the election was set aside by this Court not in the writ petition but in the election petition in which the parties had opportunity to lead evidence. He also submitted that in fact, in the absence of nomination paper on record, it is not possible to hold that respondent No. 4 misled the Returning Officer for acceptance of his nomination for the election in question. However, according to him, respondent No. 4 does not perform any function for the Government nor receives any fund from the Government and thus is not covered by the disqualifications in view of the explanation to Article 191(e) of the Constitution, which provides that a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State specified in the First Schedule by reason only that he is a Minister either for the Union or for such State.

13. This Court finds substance in the submission of learned Counsel for respondent No. 4 and also of Mr. Karn, learned Senior Standing Counsel appearing for the Election Commission. The pleadings clearly show that respondent No. 4 has seriously disputed about holding of office of profit under the State Government. It has rightly been pointed out by Mr. Prasad, learned Senior Counsel appearing for the respondent No. 4 that in the case of Shibu Soren, the honorarium and allowances to be paid to the Chairman, Vice-Chairman and Members were prescribed u/s 26 of the Act itself whereas there is no such provision in the Bihar Industrial Area Development Authority Act. Moreover, it has rightly been submitted that the consideration of dispute requires evidence and can be examined only in an election petition.

14. Having regard to the fact that the election of respondent No. 4 has been questioned in Election Petition No. 1 of 2000 which is still pending, this Court does not consider it proper to examine the contentions raised on behalf of the parties in detail as it may have some bearing on the merit of the questions raised in the election petition. In view of the disputed facts, it is not a fit case for invoking the power under Article 226 of the Constitution.

15. The writ petition is, thus, dismissed. However, in the facts and circumstances, there shall be no order as to costs. It is made clear that any observation/finding made in this order shall not in any manner prejudice the merit of the dispute involved in the election petition.