**(2002) 01 PAT CK 0116**

**In the Patna High Court**

**Case No :** L.P.A. No. 1471 of 2001

Nageshwar Prasad and Others — APPELLANT

Vs

The State of Bihar and Others — RESPONDENT

**Date of Decision :** 09-01-2002

**Acts Referred:**

**Citation :** (2002) 01 PAT CK 0116

**Final Decision :** Dismissed

## Judgement

S.N. Jha, J.—The dispute in this letters patent appeal arising out of a writ petition, CWJC No. 3159 of 2001 reported in 2002 (1) PUR 131, relates to the validity of election of Respondent No. 4 Sahid Ali Khan (hereinafter referred to as ''the Respondent'') as member of the Bihar Legislative Assembly in the 2000 Assembly Elections. The writ petition was for a writ of quo warranto or any other appropriate writ commanding the Respondent to vacate the seat as member of the Legislative Assembly. According to the Appellants, being holder of an office of profit as Chairman of the Patna Industrial Area Development Authority (PIADA) the Respondent was disqualified for contesting the election and being elected as member of the Legislative Assembly by reason of bar contained in Article 191(1)(a) of the Constitution of India. The petition having been dismissed, they have come in this letters patent appeal.

2. The case of the Appellants so far as relevant, briefly stated, is as follows. The Respondent contested the election to the Bihar Legislative Assembly from Sitamarhi Assembly constituency at the elections held in 2000 and won the election by a margin of only 35 votes. The Appellants were not aware of the fact that the Respondent was holding an office of profit under the Government as Chairman of PIADA and therefore, disqualified from contesting the election. They recently came to know about it when the Respondent came on tour in a car with becon red light. The documents which they obtained from different government offices confirmed that he was holding a public office of profit and thus suffered from disqualification, but on a false declaration in the nomination form, Form No.

28, prescribed under Rule 4 of the Conduct of Election Rules, 1961, he had contested the election. The Appellants pleaded that the appointment of Chairman of the Industrial Area Development Authority under the Bihar Industrial Area Development Authority Act, 1974 is made by the State Government and he holds office at the pleasure of the State Government; that the pay, allowances and other expenses of the Respondent as Chairman of PIADA are borne out from the State exchequer subject to the control of the Accountant General. The Respondent was appointed as Chairman of PIADA on 4.9.91 and availing of the benefits by way of pay, allowances etc. admissible to Minister of State. The Appellants gave particulars of pay, allowances and perquisites in the writ petition which it is not necessary to notice in this judgment. According to the Appellants they were under the impression that Respondent was Honorary Chairman of PIADA but the said impression was recently found to be incorrect. In the above premises the Appellants, contended that continuance of Respondent as member of the Legislative Assembly and his participation in the proceedings thereof are in contravention of the Constitutional provisions warranting immediate interference by this Court.

3. The Respondent in his counter affidavit did not dispute the facts pleased by the Appellants about his election as member of the Legislative Assembly from Sitamarhi constituency in 2000 elections and his appointment as Chairman of PIADA since 13.9.91. According to him the Bihar Industrial Area Development Authority Act does not provide for any salary and allowances nor any honorarium. The salary, allowances and other facilities which he is getting is by virtue of his status as Minister of State and not as Chairman of PIADA. The pay and allowances received by him are not borne from the State Exchequer, they are met from the fund of the Authority u/s 7 of the Bihar Industrial Area Development Authority Act. He therefore cannot be ''deemed'' to hold the office of profit under the Government.

4. The stand of the State of Bihar in its counter affidavit was rather non-committal. With reference to various paragraphs of the writ petition containing averments regarding pay, allowances etc. being paid to the Respondent, among other things, it stated that "they are either matter of records or matter regarding which no specific reply is required to be given by this Respondent". In the facts and circumstances, for the reasons mentioned thereinafter, I am satisfied that the post of Chairman of PIADA is an office of profit under the State Government and the Respondent was thus holding an office of profit when he contested the election to the Bihar Legislative Assembly at 2000 Assembly Elections.

5. The term ''office of profit'' is not a term of art, it is a term used in the Constitution while laying down the disqualification for being chosen as, and for being, a member of Parliament or the Legislative Assembly/Council, as the case may be amongst others disqualifications. The disqualification are laid down in Article 102 (in the case of Parliament) and Article 191 in the case of Legislative Assembly or Legislative Council. Since in the instant case we are concerned with

 

the Legislative Assembly, the latter may only be noticed as under:

191. Disqualifications for membership.-(1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly, or Legislative Council of a State-

(a) if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder;

(b) ....

(c) ...

6. The question as to whether the post of Chairman is an ''office of profit'' has to be considered in the context of the provisions of Bihar Industrial Area Development Authority Act the relevant provisions whereof are as follows:

Section 3 Industrial area development authority aims and objects.

(1) ...

(2) ...

(3) (i) Any such Authority shall consist of a Chairman, a Managing Director and five other Directors who shall be appointed by the State Government and who shall hold their office, on terms and conditions to be prescribed in this behalf, at the pleasure of the State Government.

Section-7. Financial powers-(1) The authority shall have and maintain its own fund to which shall be credited-

(a) all moneys received by the Authority from the State Government by way of grants, loans, advances or otherwise:

(b) all fees, rents charges, levies and fines received by the Authority under this Act;

(c) all moneys received by the Authority from disposal of its movable and immovable assets;

(d) all moneys received by the Authority by way of loan from financial and other institutions and debentures floated for the execution of a scheme or schemes of the Authority duly approved by the State Government.

(2) Unless the State Government otherwise directs, all moneys received by the Authority shall be credited to its fund which shall be kept with the State Bank of India and/or one or more of the Nationalised Banks and drawn as and when required by the Authority.

Section-8. Budget.-(1) The authority shall prepare a budget every year in respect of the financial year next ensuing, showing the estimated receipts and expenditures of the Authority and shall forward to the State Government such number of copies thereof as may be prescribed by Rules and the State Government may issue any directive as may be considered expedient for the purpose of this Act.

(2) The authority shall maintain proper accounts and other relevant records and prepare an annual statement of accounts including a balance-sheet.

(3) The accounts of the Authority shall be subject to audit annually by the Accountant-General, Bihar, and any expenditure incurred by him in connection with such audit shall be payable by the Authority to the Accountant-General, Bihar. The Accountant-General shall have all the privileges and Authority in connection with audit of the accounts of the Authority as he is entitled to in connection with audit of the Government accounts.

(4) The accounts of the Authority as credited by the Accountant-General, Bihar, or any other person appointed by him in this behalf together with the audit report shall be forwarded every year to the State Government along with an annual report.

7. A bare glance at the above provisions leaves no room for doubt that not only the Chairman of the Authority is appointed by the State Government and he holds the office at the pleasure of the State Government, but the control of the State Government over the Authority is all pervasive. In Biharilal Dobray Vs. Roshan Lal Dobray, , the Apex Court observed that the true test for determining the question whether a person, holds an office of profit under the Government depends upon the degree of control the Government has over the body it, the extent of control exercised by various other bodies or committees, its composition, the degree of its dependence on Government for its financial needs and the functional aspect, namely, whether the body is discharging any important governmental function or just some function which is merely optional from the point of view of Government. The same view was reiterated in Satrucharla Chandrasekhar Raju Vs. Vyricherla Pradeep Kumar Dev and another, . The Chairman of the Authority is paid from the fund maintained u/s 7 of the Act but having regard to the fact that bulk of it comes from the State Government as grant, loans, advances etc., and the control which the Government exercises over its disposal, the contention that the Respondent was getting his pay and allowances from the fund of the Authority and not from the State Government is not at all material. In any view, the fact that the Chairman holds office at the pleasure of the State Government decisively shows that the post of Chairman is an office of profit under the State Government coming within the mischief of Article 191(a) of the Constitution.

8. In Biharilal Dobray v. Roshan Lal Dobray (supra) the Supreme Court observed that the object of enacting Article 191(1)(a) is that a person who is elected to a Legislature should be free to carry on his duties fearlessly without being subjected to any kind of governmental pressure. It observed,

 

the term ''office of profit under the Government'' used in Clause (a) of Article 191(1) though indeterminate is an expression of wider import than a post held under the Government which is dealt with in Part XIV of the Constitution. For holding an office of profit under the Government a person need not be in the service of the, Government and there need not be any relationship of master and servant between them. An office of profit involves two elements, namely, that there should be an office and that it should carry some remuneration.

9. I do not wish to discuss this aspect of the case any further, firstly, in view of the order that I propose to pass, and secondly, in view of the fact that the Respondent has not been noticed in the instant proceeding; though having said so much, the conclusion may be that the Respondent by virtue of being Chairman of PIADA held the office of profit.

10. The question is whether writ of quo warranto or any other writ should be issued. The plea of the Respondent is that the Appellants had alternative remedy by way of election petition u/s 81 of Representation of the People Act, 1951 which they did not avail of Article 329(b) of the Constitution bars the jurisdiction of the Courts to entertain any petition questioning the election to the Parliament and/ or State Legislature except by election petition. In fact an election petition at the instance of the defeated candidate, Shri Harishankar Prasad, being Election Petition No. 1/2000 is pending in this Court in which the election of the Respondent has been challenged inter alia, on the ground of improper acceptance of the nomination within the meaning of Section 100(1)(d) of the Representation of the People Act. The case is in the stage of evidence and as a matter of fact, the election Petitioner i.e. Harishankar Prasad has closed his evidence and the Respondent has been asked to adduce evidence (on 6th, 7th and 8th August 2001). The Respondent stated that the Appellants have been set up by the said Hari Shankar Prasad and the writ petition has been filed at his instance.

11. Section 81 of the Representation of the People Act, 1951, so far as relevant, is as follows:

81. Presentation of petitions-(1) An election petition calling in question any election may be presented on one or more of the grounds specified in Sub-section (1) of Section 100 and Section 101 to the High Court by any candidate at such election or any elector within forty-five days from, but not earlier than the date of election of the returned candidate or if there are more than one returned candidate at the election and dates of their election are different, the later of those two dates.

Explanation.-In this Sub-section, elector means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

Section 100, so far as relevant, may also be quoted as under:

 

100. Grounds for declaring election to be void.-(1) Subject to the provisions of Sub-section (2) if the High Court is of opinion-

(a) that on the date of his election a returned candidate was not qualified, or was disqualified to be chosen to fill the seat under the Constitution or this Act or the Government of Union Territories Act, 1963 (20 of 1963); or

(b) ...

(c) ...

12. It was submitted on behalf of the Appellants that the ground envisaged in Section 100(1)(a) of the Representation of the People Act read with Article 191(1)(a) of the Constitution does not figure as a ground of challenge in the above election petition and therefore, there is no likelihood of the point being adjudicated in the proceeding. And so far as the Appellants are concerned, as they were not aware of the fact about the Respondent holding an office under the State Government until recently, they did not file election petition, and now they cannot do so after expiry of the period of limitation.

13. It is difficult to accept the case of the Appellants. From the affidavit of the Respondent it appears that he had contested the Assembly elections in 1995 as well. Admittedly he has been holding the post of Chairman since September, 1991. It is difficult to believe that the Appellants upon seeing the Respondent travelling in a Car with becon light atop it "recently", made enquiry and came to know about the Respondent holding the said post. The Appellants are admittedly voters in the said election and therefore ''electors'' within the meaning of Explanation to Section 81(1) of the Representation of the People Act. It was thus open to them to file election petition.

14. A conjoint reading of Sections 81 and 100(1)(a) of the Representation of People Act makes it clear that election of a returned candidate can be challenged by election petition on any of the grounds specified in Section 100(1) or Section 101. The ground that the Respondent was not qualified, or disqualified to be chosen as member of the Legislative Assembly under Article 191(1)(a) of the Constitution, is a ground specifically mentioned in Clause (a) of Section 100(1) of the Representation of the People Act. The ground was thus available to the Appellants and indeed, the election Petitioner of Election Petition No. 1/2000 or any other elector. The said provisions squarely cover the ground of challenge of the election of Respondent in the present case. The remedy of the Appellants was to file election petition. Simply because they were not aware of the relevant facts, as alleged by them, until ''recently'' can not be sufficient ground for maintaining writ petition specially in view of the bar contained in Article 329(b) of the Constitution which reads as under:

329 (b). No election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be

 

provided for by or under any law made by the appropriate Legislature.

The above bar cannot be allowed to be circumvented simply on the ground that Appellants on account of their alleged ignorance of facts could not file election petition.

15. Counsel for the Appellants submitted that existence of remedy of election petition is not a bar to entertaining writ petition and in this regard placed reliance on decisions in Brundaban Nayak Vs. Election Commission of India and Another, S.R. Chaudhuri Vs. State of Punjab and Others, para 38 and B.R. Kapur v. State of Tamil Nadu and Anr. (2001) 7 SCC 231 paras 55 and 56.

16. I have gone through the decisions which were rendered on their own facts and are of no avail to the Appellants. It is well settled that existence of alternative remedy does not bar entertaining a writ petition. In an appropriate case, for the ends of justice, the High Court can entertain writ petition but so far as the present case is concerned, coming as it did during pendency of election petition by the defeated candidate in which the election Petitioner has closed his evidence, I have grave doubts about the bona fide of the Appellants. In any case, in view of the bar contained in Article 329(b) of the Constitution, and the ground of challenge being squarely covered by Section 100(1)(a) read with Section 81 of the Representation of People Act, I do not think Appellants were entitled to issuance of any writ. Thus the learned Single Judge did not commit any error in dismissing the writ petition.

17. In the result, I do not find any merit in this letters patent appeal which is accordingly, dismissed.

Shashank Kumar Singh, J.

18. I agree.

 