
(2010) 12 PAT CK 0071
In the Patna High Court
Case No : CWJC No. 6169 of 2009

Rabindra Prasad Gupta

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 10-12-2010

Acts Referred:

Citation : (2010) 12 PAT CK 0071

Final Decision : Allowed

Judgement

S.N. Hussain, J.—This writ petition has been filed challenging order dated 29.4.2009 (Annexure-12) passed by the Principal Secretary, Panchayati Raj Department Govt. of Bihar, Patna (Respondent No. 2) by which the Petitioner was removed from the post of Mukhiya, Raj Madhopur Gram Panchayat, Barauli (hereinafter referred to as "the Gram Panchayat") in the District of Gopalganj under the provision of Section 18(5) of the Bihar Panchayat Raj Act, 2006 (hereinafter referred to as "the Act" for the sake of brevity) and for other ancillary reliefs.

2. Earlier CWJC No. 2044 of 2009 was filed by one Phuljhari Devi who was the Up-Mukhiya of Raj Madhopur Gram Panchayat for directing the Respondents-authorities to remove the Petitioner of the instant case, who was impleaded as Respondent No. 8 in the said writ petition, from the post of Mukhiya of the said Gram Panchayat. The said writ petition was heard on 11.2.2009 and was disposed of with a direction to the Principal Secretary of the Panchayati Raj Department, Govt. of Bihar, Patna (Respondent No. 2) to hear the parties in dispute and render his opinion within a period of two months from the date of communication/production of a copy of that order. It transpires that only thereafter the impugned order dated 29.4.2009 (Annexure-12) was passed by the Principal Secretary (Respondent No. 2) under the provision of Section 18(5) of the Act.

3. The instant writ petition has been filed on 15.5.2009 against the said order dated 29.4.2009 and in this case I.A. No. 3571 of 2009 was filed by the

Petitioner for stay of election on the post of Mukhiya of the Gram Panchayat, but the said interlocutory application was rejected by a bench of this Court on 8.7.2009. The election for the aforesaid vacant post of Mukhiya was held on 9.7.2009 in which the Petitioner did not contest, but his wife contested and lost, whereas one Vijay Kumar Prasad succeeded in the said election as Mukhiya for the remaining period. This election was not challenged either by the Petitioner or his wife under the provisions of Sections 134 and 137 of the Act.

4. However, the Petitioner filed I.A. No. 1221 of 2010 in the instant writ petition for adding a relief challenging the aforesaid election held on 9.7.2009 and also for adding Vijay Kumar Prasad as Respondent No. 14 to the writ petition. In the said interlocutory application a prayer was also made for restraining Respondent No. 14 from functioning as Mukhiya of the said Gram Panchayat. By order dated 10.2.2010 a bench of this Court allowed the said amendments and directed issuance of notice to the newly added Respondent No. 14. Thereafter, vide order dated 21.4.2010 a Bench of this Court stayed the impugned order of Respondent No. 2 dated 29.4.2009 (Annexure-12) holding that consequence would be that there would be no vacancy and consequentially the election of Respondent No. 14 and his functioning as such would remain stayed.

5. Against the order of stay dated 21.4.2010, Respondent No. 14 filed L.P.A. No. 803 of 2010* which was allowed on 30.4.2010 and order of stay dated 21.4.2010 passed by the learned Single Judge of this Court was set aside. Similarly, Up-Mukhiya Phuljhari Devi (Respondent No. 10) also filed L.P.A. No. 795 of 2010 against the aforesaid order of stay and the said appeal was disposed of by a Bench of this Court on 30.4.2010 in terms of the abovementioned order dated 30.4.2010 passed in L.P.A. No. 803 of 2010*. Now, this writ petition has come up before this Court for final hearing.

6. Learned Counsel for the Petitioner has claimed that the impugned order was pass (SIC) a most mala fide and prejudicial manner by which a duly elected Mukhiya working honestly without obliging any of the Respondents-authorities was removed from his post u/s 18(5) of the Act without providing any adequate opportunity and without considering even a single document produced before him banking upon only a bail order passed by the Sessions Judge in a criminal case which is still sub judice and which fact was not placed before Respondent No. 2 by either of the parties which clearly shows the bias of the authorities against the Petitioner and their arbitrariness and mala fides while passing the impugned order for extraneous reasons in colourable exercise of jurisdiction which was not sustainable in the eye of law.

7. Learned Counsel for the Petitioner further claimed that after the proceeding u/s 18(5) of the Act was initiated by Respondent No. 2, notice was issued to the Petitioner who appeared on the first date fixed i.e. 25.3.2009 (Annexure-10) through his lawyer and sought adjournment and prayed for copy of the allegation petition with charges against the Petitioner. The said prayer was not allowed nor any chit of paper was provided to the Petitioner, but anyhow the Petitioner filed

his reply on 1.4.2009 (Annexure-11) stating the entire matter as well as his claim and grounds in detail. It was also claimed by learned Counsel for the Petitioner that after 1.4.2009 no date was fixed in the matter nor any opportunity was given to the Petitioner to place his claim and all of a sudden final order dated 29.4.2009 (Annexure-12) was passed against the Petitioner. It was further argued that in the said impugned order neither the reply of the Petitioner dated 1.4.2009 nor any other material was considered by Respondent No. 2 who passed the impugned order dated 29.4.2009 only on the basis of order of the District & Sessions Judge, Gopalganj dated 26.2.2008 rejecting the bail petition of the Petitioner in Barauli P.S. Case No. 8 of 2008 which was instituted for offences punishable under Sections 420, 406 and 409 of the Indian Penal Code which would be apparent from the impugned order itself.

8. It was further claimed by learned Counsel for the Petitioner that CWJC No. 2044 of 2009 was filed by the Up-Mukhiya (Respondent No. 10) in collusion with Respondent Nos. 11 and 14 as the aforesaid Up-Mukhiya (Respondent No. 10) wanted to oust the Petitioner in order to become Mukhiya. He further averred that from the order passed by this Court disposing of CWJC No. 2044 of 2009 it is quite apparent that there was no direction or observation against the Petitioner and the matter was merely referred to the authority concerned as the dispute in question could have been decided only u/s 18(5) of the Act.

9. On the other hand, learned Counsel for Respondent No. 14 submitted that there was a serious allegation against the Petitioner for offences punishable under Sections 420, 406 and 409 of the Indian Penal Code vide Barauli P.S. Case No. 8 of 2008 which was initiated on the basis of written report of one Rakesh Gupta, the Block Development Officer of Barauli Block alleging that the Petitioner being Mukhiya of Raj Madhopur Gram Panchayat had taken graft in lieu of furnishing death certificate, ration card, Antodaya-card and facility of Indira Awas Scheme to various persons and has also allotted Solar-lamp in the name of his mother and got installed at his house committing gross irregularity and misuse of his power. He further submitted that the allegations and facts involved were fully considered by the District & Sessions Judge, Gopalganj in his order dated 26.2.2008 rejecting the petition for bail filed by the Petitioner, hence the said order was sufficient material for Respondent No. 2 to pass his impugned order (Annexure-12) removing the Petitioner from the post of Mukhiya. In this connection, he relied upon a decision of the Supreme Court in case of Tarlochan Dev Sharma Vs. State of Punjab and Others, in which it was held that a course of conduct involving willful abuse or intentional wrong or a plurality of aberration of failure in exercise of power involving dishonesty of intention is abuse of powers. He also relied upon paragraphs 17 and 21 of the decision of the Supreme Court in case of Sharda Kailash Mittal Vs. State of M.P. and Others, which were with respect to actual contents of charges and the relevant rules as well as communications between the local leaders and the State Government seeking the Government's intervention in taking action.

10. Learned Counsel for Respondent No. 14 referred to two orders of this Court both dated 11.8.2010 passed in Cr.W.J.C. No. 473 of 2010 and Cr.W.J.C. No. 574 of 2010 which were filed for arrest of the accused persons and for submission of charge-sheet against the accused persons, including Petitioner. However, by the said orders, the investigating officer was directed to conclude the investigation in accordance with law within a period of four months from the date of receipt/production of a copy of that order and to consider recording of statement of the victim u/s 164 of the Code of Criminal Procedure. Hence, he submitted that the Petitioner of the instant writ case is not entitled to any equitable relief. He also claimed that writ petition is also barred under the provision of Article 243-O of the Constitution of India. He relied upon a decision of this Court in case of Nikesh Kumar Vs. The State of Bihar and Others in which it was held that certain cases were not amenable to writ jurisdiction in view of bar created by Article 243-O(b) of the Constitution as well as Sections 137 and 138 of the Act.

11. Learned Counsel for Respondent No. 14 further averred that in view of the impugned order dated 29.4.2009 (Annexure-12) passed by Respondent No. 2 u/s 18(5) of the Act, fresh election for the post of Mukhiya of the Gram Panchayat was fixed on 9.7.2009 and even I.A. No. 3571 of 2009 filed by the Petitioner for stay of the election was rejected by this Court on 8.7.2009, hence election for the post of Mukhiya was held on 9.7.2009 in which the Petitioner did not contest, but his wife contested and lost, whereas Respondent No. 14 was elected as Mukhiya for the remaining period. It is further claimed that I.A. No. 1221 of 2010 was also filed by the writ Petitioner for stay on which order dated 21.4.2010 was passed by a Bench of this Court, staying the operation of impugned order and consequently also staying the election of Respondent No. 14 to the post of Mukhiya, but the said order of learned Single Judge was set aside by a Division Bench of this Court vide order dated 30.4.2010 passed in L.P.A. No. 803 of 2010*. Hence, he averred that now Respondent No. 14 is the duly elected Mukhiya and is functioning on the orders of this Court at least since 30.4.2010 and third party interest has been created in his favour which has to be protected in accordance with law. In this connection, learned Counsel for Respondent No. 14 relied upon a decision of the Supreme Court in case of Rameshwar Prasad and Ors. v. Union of India and Anr. reported in 2005 (4) PUR (SC) 256 in which although proclamation was held to be unconstitutional but status quo ante was not ordered to be restored. He also relied upon a decision of the Apex Court in case of Janatha Textiles and Others Vs. Tax Recovery Officer and Another, in which it was held that the strangers to the decree have to be afforded protection by the court because they are not connected with the decree and that in a third party auction purchaser's interest in the auctioned property continues to be protected notwithstanding that the underlying decree is subsequently set aside or otherwise.

12. Learned Counsel for Respondent No. 14 also argued that even if the impugned order is to be set aside, the order which can be passed by this Court is mentioned in paragraph 31 of the decision of the Apex Court in case of Sharda

Kailash Mittal Vs. State of M.P. and Others, He also contended that fresh elections of Gram Panchayats in the State of Bihar are going to be held in April-May, 2011, hence according to him there is no occasion for any interference by this Court in the impugned order passed by Respondent No. 2. In this regard, he relied upon a decision of the Apex Court in case of Jyoti Basu and Others Vs. Debi Ghosal and Others, in which it was held that an election petition is not an action at Common Law, nor in equity and it is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes are applied. He also relied upon another decision of the Supreme Court in case of Sharda Kailash Mittal Vs. State of M.P. and Others, in paragraph 31 of which it was held that since fresh election was already conducted, there was no occasion for disturbing the subsequent event.

13. The contentions of learned Counsel for Respondent No. 14 were supported by learned Counsel for the State of Bihar and its authorities as well as by learned Counsel for the State Election Commission and also by learned Counsel for private Respondent Nos. 10, 11 and 13 who raised similar objections to the writ petition.

14. Considering the respective arguments of the parties as well as the materials on record, it is not in dispute that the Petitioner was elected as Mukhiya of the Gram Panchayat in the year 2006 and the impugned order was passed against him under the provision of Section 18(5) of the Act on 29.4.2009 (Annexure-12) by which the Principal Secretary, Panchayati Raj Department, Govt. of Bihar (Respondent No. 2) removed him from the post.

15. So far the question of jurisdiction of this Court for considering the instant matter in view of Article 243-O of the Constitution of India and the decision of this Court in case of Nikesh Kumar (supra) is concerned, the said provision of the Constitution of India is with respect to bar to interference by courts in electoral matter in which it has only been provided that no election to any Panchayat shall be called in question except by an election petition presented to such authority in the manner provided by law. Similarly, in case of Nikesh Kumar (supra), the question was for postponing the counting and holding a fresh poll which was held by this Court to be not amenable to the writ jurisdiction of this Court in view of bar created by Article 243-O(b) of the Constitution of India as well as Sections 137 and 138 of the Act. But in the instant case, neither the question of election nor any question of counting is involved, rather this writ petition has been filed challenging the removal of the Petitioner by an executive order dated 29.4.2009 (Annexure-12) under the provision of Section 18(5) of the Act. Accordingly, the provision of Article 243-O of the Constitution as well as the decision of this Court in case of Nikesh Kumar (supra) are not applicable to the facts and circumstances of this case and this writ petition is maintainable against the impugned order.

16. So far the merit of the impugned order dated 29.4.2009 (Annexure-12) is concerned, it is quite apparent that proceeding u/s 18(5) of the Act was initiated

on the basis of order of this Court dated 11.2.2009 passed in CWJC No. 2044 of 2009 which was filed by the Up-Mukhiya (Respondent No. 10) against the Mukhiya (Petitioner) and the said proceeding was finally decided by the impugned order dated 29.4.2009 (Annexure-12) by the Principal Secretary (Respondent No. 2) only on the basis of order dated 26.2.2008 passed by the District & Sessions Judge, Gopalganj rejecting the bail petition of the Petitioner in Barauli P.S. Case No. 8 of 2008 which was instituted against several persons including the Petitioner for offences punishable under Sections 420, 406 and 409 of the Indian Penal Code.

17. CWJC No. 2044 of 2009 was disposed of vide order dated 11.2.2009 without considering the merits of the claim of Up-Mukhiya (Respondent No. 10) and a mere direction was given to the Principal Secretary (Respondent No. 2) to hear the parties and render his opinion within a period of two months from the date of communication/production of a copy of the said order. Hence, no action was directed to be taken against the Petitioner, rather the Principal Secretary (Respondent No. 2) was directed to pass an appropriate order after hearing both the parties. But from the impugned order dated 29.4.2009 (Annexure-12) it is quite apparent that neither the claim of the Petitioner nor the materials produced by him were considered by the Principal Secretary (Respondent No. 2) while passing the order of removal of the Petitioner. Thus, the said authority (Respondent No. 2) not only violated the specific order of this Court dated 11.2.2009 passed in CWJC No. 2044 of 2009, but also ignored the basic principle of law to consider the claim of the person against whom order was going to be passed.

18. The record of the case also shows that after the proceeding u/s 18(5) of the Act was initiated by Respondent No. 2, notice was issued to the Petitioner who appeared for the first time on 25.3.2009 through his lawyer and sought adjournment and prayed for copy of the allegation petition with charges against the Petitioner. Neither the said prayer was allowed nor any chit of paper was provided to the Petitioner, whereafter the Petitioner filed his reply on 1.4.2009 denying the entire allegations in detail. Thereafter, no date was fixed in the matter by Respondent No. 2, nor any opportunity of hearing was provided to the Petitioner to place his claim and final order was suddenly passed on 29.4.2009 (Annexure-12) against the Petitioner without considering the claim and grounds raised by him in his reply dated 1.4.2009 and the materials produced by him.

19. Furthermore, impugned order dated 29.4.2009 (Annexure-12) also clearly shows that in paragraph-1 thereof statement with regard to order dated 11.2.2009 passed in CWJC No. 2044 of 2009 was made, whereas in paragraph-2, the claim of the complainant was mentioned in which one sentence was attributed to the accused (Petitioner) merely stating that he denied all the charges. In paragraph-3 of the said order, four allegations against the Petitioner were enumerated and in paragraph 4 thereof the entire order of the District & Sessions Judge, Gopalganj dated 26.2.2008 was noted, whereas in paragraphs

(wrongly numbered as 6) it was stated that paragraph 4 clearly showed that in view of investigation report and case diary there was sufficient basis for removal of the Petitioner u/s 18(5) of the Act. It was also noted therein that Petitioner was released on the order of High Court on 18.4.2008.

20. From the aforesaid facts and circumstances as well as the materials it is quite apparent that the only basis for removal of the Petitioner was the rejection of his bail petition by the District & Sessions Judge, Gopalganj. The order passed in a bail matter cannot be legally assumed to have any finality with respect to the charges against the accused person unless the trial is finally concluded against him. Furthermore, in the impugned order, Respondent No. 2 having himself found that after the rejection of the bail petition by the District & Sessions Judge, bail petition of the Petitioner was allowed by the Patna High Court, there was no occasion for the Principal Secretary (Respondent No. 2) to rely upon the said order of the District & Sessions Judge dated 26.2.2008 and pass an order of Petitioner's removal merely on its basis.

21. Apart from the materials produced by the Petitioner, the authority concerned, namely the Principal Secretary (Respondent No. 2), did not even mention any other material against the Petitioner which could have been used against him for his removal. Law is well settled that such removal could be resorted to only under grave and exceptional circumstances which were clearly not present in the instant case and no charge of causing any financial loss to the Gram Panchayat could be established by any material whatsoever. In case of Sharda Kailash Mittal (supra), the Apex Court had specifically held that there were no sufficient guidelines in the provisions as to the manner in which such power of removal of an elected Mukhiya had to be exercised except that it required that reasonable opportunity of hearing has to be afforded to the person proceeded against. It was also held that keeping in view the nature of power and the consequences that flow on its exercise, it has to be held that such power can be invoked by the State Government only for very strong and weighty reason and such power is not to be exercised for minor irregularity in discharge of duty by the holder of the elected post because the holder of office occupies it by election and he is deprived of the office by an executive order in which electorate has no chance of participation. In that view of the matter, the case law relied by learned Counsel for the Respondents in case of Tarlochan Dev Sharma (supra) is not applicable to the facts and circumstances of this case. Hence, the Principal Secretary (Respondent No. 2) has not only committed procedural irregularities while passing the impugned order dated 29.4.2009 (Annexure-12) but has also committed grave illegality in issuing the order of Petitioner's removal.

22. So far the other point raised by learned Counsel for the Petitioner relying upon paragraph-31 of the decision of the Apex Court in case of Sharda Kailash Mittal (supra) is concerned, it is quite apparent that the Supreme Court realizing that tenure of the Petitioner before it having come to an end and fresh election which was due having already been conducted, there was no occasion in

disturbing the subsequent event. But in the instant case, admittedly the tenure of Gram Panchayat and its Mukhiya has not come to an end and no election was due as according to the Respondents themselves the tenure of five-years which started in 2006 will come to an end in April-May, 2011 and hence the said case law is not applicable to the facts of this case. In the aforesaid circumstances, the decision of the Apex Court in the case of Jyoti Basu (supra) relied upon by learned Counsel for the Respondents is also not applicable to this case.

23. So far the question of third party interest raised by learned Counsel for Respondent No. 14 is concerned, it has been argued on his behalf that in compliance of the impugned order dated 29.4.2009 (Annexure-12) fresh election for the post of Mukhiya was held in which Respondent No. 14 was elected. In the instant case, the impugned order passed by the Principal Secretary (Respondent No. 2) has been found to be absolutely illegal, arbitrary and perverse and also against the settled principles of law and hence on its basis any step taken during the pendency of this writ petition will be governed by the principles of *lis pendens* and there is no occasion for granting any *status quo ante*. Furthermore, the Respondents were very well aware of the pendency of this writ petition and were fully heard at every stage and hence any step taken by them during the pendency of this writ petition will have to be subject to the result of this writ petition. The case, laws relied upon by learned Counsel for the Respondents in case of Rameshwar Prasad (supra) as well as in case of Janatha Textiles (supra) are with respect to completely different set of facts and principles involved as the former is merely with respect to dissolution of assembly and the latter is with regard to auction purchase.

24. Considering the entire facts and circumstances of this case, it is quite apparent that the Petitioner has raised valid and legal points which could not be disproved by the Respondents and the impugned order dated 29.4.2009 (Annexure-12) passed by Principal Secretary (Respondent No. 2) suffers from grave illegalities, apart from procedural irregularities, and, accordingly, the same is hereby quashed and consequently, order dated 17.6.2009 (Annexure-17 series at page-14 of I.A. 3571 of 2009) as well as letter No. 914 dated 17.7.2009 (Annexure-20 to I.A. No. 1221 of 2010) issued by the Returning Officer of the Panchayat in favour of Respondent No. 14 as well as the election of Respondent No. 14 and its entire procedure are hereby quashed.

25. This writ petition is, accordingly, allowed with a liberty to the Principal Secretary, Panchayati Raj Department, Govt, of Bihar (Respondent No. 2) to initiate a fresh proceeding against the Petitioner if it is found to be necessarily required and there are sufficient valid materials for the same.