

(2006) 11 PAT CK 0120
In the Patna High Court
Case No : C.W.J.C. No. 10389 of 2006

Rekha Kumari

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 06-11-2006

Acts Referred:

Citation : (2006) 11 PAT CK 0120

Judgement

S.N. Hussain, J.—Heard learned Counsel for the petitioner, learned Counsel for the State and learned Counsel for the Bihar State Election Commission.

2. This writ petition has been filed challenging order dated 09.08.2006, by which the State Election Commissioner allowed Case No. 28 of 2006 filed by Kiran Kumari (respondent No. 7), holding that the date of birth of Rekha Kumari (petitioner) was 16.11.1985 and hence she having not completed 21 years of age, was neither eligible at the time of filing nomination paper for the post of Member of Goitha Panchayat on 09.03.2006, nor was she eligible at the time of filing nomination paper for the post of Pramukh of Banke Bazar Panchayat Samiti on 28.06.2006 and consequently after setting aside the elections of the petitioner directed the aforesaid posts to be vacant.

3. Learned Counsel for the petitioner submitted that the programme for elections having been declared and nominations from the members having been invited by the Bihar State Election Commission (hereinafter referred to as "the Commission" for the sake of brevity), the petitioner filed her nomination paper for the post of Member of Goitha Panchayat under Banke Bazar Panchayat Samiti within the prescribed time on 09.03.2006, whereas, respondent No. 7, who was voter of Dandwa Panchayat, filed nomination paper for the post of Member of Dandwa Panchayat. It was also stated that on 10.03.2006 the authority fixed 13.03.2006 as the date for scrutiny of the nominations with a liberty to file objection, but no objection was ever raised against the petitioner's nomination, Whereafter, it was scrutinised and accepted and symbol was also allotted to the petitioner on 13.03.2006. Learned Counsel for the petitioner further submits that

thereafter election for the post of Member of Goitha Panchayat was held on 08.06.2006, Whereafter, counting of votes was done and the petitioner having secured highest number of votes was declared elected on 18.06.2006 and, accordingly, a certificate was granted to her on 19.06.2006 as successful candidate.

4. Subsequently, 28.06.2006 was fixed as the date of filing nomination, scrutiny and election for the post of Pramukh of Banke Bazar Panchayat Samiti, within which Goitha Panchayat and Dandwa Panchayat along with other Panchayats were situated. Petitioner and respondent No. 7 filed their respective nominations and, thereafter, they were scrutinised and accepted as no objection was raised by any one against them. Accordingly, election was held on 28.06.2006, in which the petitioner having secured maximum number of votes was elected and a certificate to that effect was granted to her and, accordingly, on 29.06.2006 oath was also administered to the petitioner as Pramukh of aforesaid Panchayat Samiti. Whereafter, she started functioning since then as Pramukh of the said Panchayat Samiti.

5. Learned Counsel for the petitioner also averred that much thereafter on 13.07.2006 respondent No. 7 filed a complaint before the Commission, which was numbered as Case No. 28/2006, in which she challenged the elections of the petitioner for both the posts, namely, Member of Goitha Panchayat and Pramukh of Banke Bazar Panchayat Samiti on the sole ground that she had not attained the age prescribed by law at the time of filing her nominations for the aforesaid posts. Learned Counsel for the petitioner also states that on 19.07.2006 notices were issued to the petitioner by the Commissioner, Whereafter on 05.08.2006 the petitioner appeared and filed her written statement (Annexure 6) and only on the filing of the written statement, the State Election Commissioner passed impugned order dated 09.08.2006 (Annexure 1) without giving any opportunity to the petitioner to place her case by way of arguments and allowed the claim of respondent No. 7 setting aside the petitioner's elections on the posts of Member of Goitha Panchayat and Pramukh of Banke Bazar Panchayat Samiti. Accordingly, re-election had been ordered, which has not yet started.

6. Learned Counsel for the petitioner raised several legal and factual errors in the impugned order. He submitted that since both the aforementioned elections for the post of Member of Goitha Panchayat as well as for the post of Pramukh of Banke Bazar Panchayat Samiti have already been concluded on 18.06.2006 and 28.06.2006, respectively; whereafter certificates of successful election have been granted to her and oath of office has also been administered to her and whereafter she has been functioning on those posts, no such complaint, as filed by respondent No. 7, was maintainable before the Commission and the Commission had no jurisdiction or authority to entertain and decide the same. In this regard, he relied upon an order of this Court dated 25.09.2006 passed in C.W.J.C. No. 8246 of 2006 (Neelam Kumari Sharma v. State and Ors.), which clearly shows that in the said writ petition the Commission itself refused to

interfere into such an election matter on the ground that the election process having already been concluded, it had no jurisdiction to pass any order. He further relied upon Sections 136, 137 and 139 of the Bihar Panchayat Raj Act (hereinafter referred to as "the Act" for the sake of brevity) and also upon Article 243O of the Constitution of India.

7. Learned Counsel for the petitioner stated that respondent No. 7 has challenged both the elections of the petitioner, namely, for the post of Member of Goitha Panchayat as well as Pramukh of Banke Bazar Panchayat Samiti. So far as petitioner's election for the post of Member of Goitha Panchayat is concerned, it is stated by her counsel that respondent No. 7 was, admittedly, neither a candidate for that post nor was she even a voter of the said Panchayat, hence, she was legally not eligible to challenge the said election before any authority. In this regard, he relied upon a decision of this Court in the case of Raghuni Nayak and Ors. v. District Magistrate, Darbhanga reported in 1958 B.L.J.R. 177.

8. So far petitioner's election for the post of Pramukh of Banke Bazar Panchayat Samiti is concerned, learned Counsel for the petitioner submitted that respondent No. 7 can also not challenge this election of the petitioner until her election for the post of Member of Goitha Panchayat is not successfully challenged by any eligible person. In the instant case, it is quite apparent that no eligible person has challenged the election of the petitioner for the post of Member of Goitha Panchayat and hence the entire claim of respondent No. 7 should have been rejected on the ground that she was not eligible to raise any such objection against her election to the post of Pramukh. In this regard, he also averred that respondent No. 7 had never claimed either in her complaint before the Commission or even in the counter-affidavit filed before this Court that earlier she was not aware about the age of the petitioner nor has any date of such information been mentioned therein, hence there was no occasion for the Commission to entertain such frivolous complaint.

9. So far question of date of birth of the petitioner is concerned, learned Counsel for the petitioner submitted that her date of birth was 09.03.1985, but in the impugned order it has wrongly been held to be 16.11.1985 as the Admission Register of the Primary School, Atopur, Block Gurua, District Gaya, clearly shows her date of birth to be 09.03.1985 as declared in the school by her father on 23.01.1989 (Annexure "A" to Annexure 6). He also submitted that the Headmaster of the said school had also issued a transfer certificate on 23.03.2006 (Annexure "B" to Annexure 6) to the petitioner for obtaining higher education, in which her date of birth was specifically mentioned as 09.03.1985. In this regard, he submitted that the Headmaster of the School also addressed a letter to the Deputy Secretary, Bihar State Election Commission, Patna, certifying that the date of birth of the petitioner was 09.03.1985 as entered in the Admission Register of the school, original of which he was ready to produce (Annexure "C" to Annexure 6). He also stated that the petitioner has filed a petition (Annexure "D" to Annexure 6) before the Secretary, Bihar School

Examination Board, Patna (hereinafter referred to as "the Board" for the sake of brevity) through the Headmaster of the school for correction of date of her birth much earlier, which is still pending. He also relied upon the affidavit of her father showing her date of birth to be 09.03.1985 and also upon the voter list.

10. In the said circumstances, learned Counsel for the petitioner submitted that petitioner's date of birth being mentioned as 16.11.1985 in the certificate of the Board having, admittedly, not been recorded on the basis of any application or affidavit by any of the parents of the petitioner, whereas, on the other hand, there was an affidavit by her father along with other relevant documents to show that her date of birth was definitely 09.03.1985, there was no occasion for the Commission to rely upon the said certificate in view of the aforesaid decisions of the Hon'ble Apex Court. He also stated that the only other document, which was relied upon by respondent No. 7, is an undated application said to be filed by the petitioner for the post of Shiksha Mitra, which was forwarded by the Block Development Officer on 25.08.2006 (Annexure A), in which her date of birth was mentioned as 16.11.1985. He submitted that neither the petitioner had sent the said letter nor was it in her handwriting nor even did it contain her signature and furthermore there was no occasion for the petitioner to file any such application as she had already been elected as Pramukh a couple of months back. Moreover, the said forwarding letter is dated 25.08.2006, which is even subsequent to the date of passing of the impugned order and as such no objection regarding that had been raised by respondent No. 7 before the Commission and, thus, it is clearly a forged and fabricated document prepared specially for the purposes of this case only.

11. On the other hand, learned Counsel for the Commission as well as learned Counsel for private respondent No. 7 vehemently opposed the contentions of learned Counsel for the petitioner and submitted that Section 136(2) of the Act specifically provides that if any question arises as to whether a Member of a Panchayat at any level or Mukhiya of Gram Panchayat or Sarpanch of Gram Katchahri was before election or has become after election subject to any of the disqualifications mentioned in Clause (1), the question shall be referred for the decision of State Election Commissioner. It was further submitted that Sub-section (1) of the aforesaid section provided that notwithstanding anything contained in this Act, a person shall be disqualified for election or after election for holding the post of Mukhiya, member of the Gram Panchayat, Sarpanch, Panch of the Gram Katchahri, member of the Panchayat Samiti and member of the Zila Parishad if such person is so disqualified by or under any law for the time being in force for the purposes of elections to the Legislature of the State. They also submitted that the Commission had full jurisdiction and authority to consider such a matter and decide the same in accordance with law as the petitioner comes under the category of disqualification under law on the ground of age.

12. In this connection, they relied upon the provision of Section 139(2) as provided in the earlier Act, namely, Bihar Panchayat Raj Act, 1993, in which, it

was provided that if any question arises as to whether a member of a Panchayat at any level has become subject to any of the disqualifications mentioned in Sub-section (1), the question shall be referred for the decision of such authority and in such manner as the Government may by law provide. They also relied upon a decision of this Court in the case of *Suo Motu action by the High Court Vs. State of Bihar and Others*, in which, it was held that if an election petition cannot be filed within 30 days then clearly the guidelines given by the Constitution in Sub-clause (2) of Article 243F, re-produced in the aforesaid provision of the Bihar Panchayat Raj Act, 1993, was possibly contemplating an authority other than the authority, which is to hear an election petition. Hence, learned Counsel for the respondents submitted that the Commission had full jurisdiction and authority to pass the impugned order even suo motu.

13. Learned Counsel for the respondents also submitted that the certificate (Annexure B) of the Board along with her own application (Annexure C) filed by the petitioner for the post of Shiksha Mitra clearly goes to show that the nomination papers filed by the petitioners for the aforesaid two posts contained wrong statements with respect to the petitioner's age and according to the actual age of the petitioner, she was not eligible to file nomination paper either for the post of Member of the Panchayat or for the post of Pramukh of the Panchayat Samiti. They also stated that neither any valid evidence were adduced by the petitioner before the Commission to contradict the certificate of the Board nor was the said certificate ever challenged by the petitioner as forged and fabricated. It was further stated on behalf of the respondents that full opportunity was given to the petitioner to place her case but she only filed her written statement but never tried to argue the case although her Advocate was throughout present and only thereafter the impugned order was passed considering all the points involved and hence it requires no interferences.

14. After considering the facts and circumstances of the case, the points raised by the parties and the materials produced on record, it is quite apparent that learned Counsel for the respondents have wrongly relied upon Section 139 of the Bihar Panchayat Raj Act, 1993 and the decision of this Court passed on its basis in the case of *Suo Motu action by the High Court (supra)* as the provisions of the said earlier Act are no more applicable due to coming into force of the new Bihar Panchayat Raj Act, 2006, Section 139 of which reads as follows:

139. Grounds for declaring election to be void- (1) Subject to the provisions of Sub-section (2) if the prescribed authority is of opinion-

(a) that on the date of his election, a returned candidate was not qualified or was disqualified to be chosen as a member under this Act; or

(b) that any corrupt practice has been committed by a returned candidate or his agent or by any other person with the consent of a returned candidate or his agent; or

(c) that any nomination paper has been improperly rejected; or

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected.

(i) by the improper acceptance of any nomination; or

(ii) by any corrupt practice, committed in the interests of the returned candidate by an agent; or

(iii) by the improper reception, refusal or rejection of any vote or reception of any vote which is void; or

(iv) by any non-compliance with the provisions of this Act or of any rules or orders made thereunder the prescribed authority shall declare the election of the returned candidate to be void.

(2) If in the opinion of the Prescribed Authority, any agent of a returned candidate has been guilty of any corrupt practice, but the prescribed authority is satisfied.

(a) that no such corrupt practice was committed at the election by the candidate and every such corrupt practice was committed contrary to the orders and without the consent of the candidate;

(b) that the candidate took all reasonable measures for preventing the commission of corrupt practices at the election; and

(c) that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agent; then the Prescribed Authority may decide that the election of the returned candidate is not void.

15. The elections in question have been conducted in accordance with the provisions of the new Act, Sub-sections (1) and (2) of Section 139 of which as shown above provided that only the prescribed authority can decide the election of the returned candidate to be void and the only authority prescribed in the Act is the Election Tribunal as provided in Section 137 of the new Act, which reads as follows:

137. Election Petition-(1) The election to any office of a Panchayat or a Gram Katchahry shall not be called in question except by an election petition as prescribed:

Provided that if an election to any office of a Gram Panchayat or Gram Katchahry is under dispute, the election petition shall lie before such Munsif within whose jurisdiction such Gram Panchayat or Gram Katchahry is situated and if the election to any office of Panchayat Samiti or to a Zila Parishad is under dispute, the election petition shall lie before such Sub-Judge within whose jurisdiction such Panchayat Samiti or Zila Parishad, as the case may be, is situated.

16. Furthermore, so far as the provision of Sub-section (2) of Section 136 of the new Act is concerned, it is quite apparent that only such disqualifications, which are evident on their face and cannot be legally denied and also do not require

any evidence can be referred for decision of the State Election Commission. Section 136(2) of the Act reads as follows:

136. Disqualification for Membership-

(2) If any question arises as to whether a Member of a Panchayat at any level or Mukhiya of Gram Panchayat or Sarpanch of Gram Katchhary was before election or has become after election subject to any of the disqualifications mentioned in Clause (1); the question shall be referred for the decision of State Election Commissioner. The matter of disqualification may be brought to the notice of State Election Commission in the form of a complaint, application or information by any person or authority. The State Election Commission may also take suo-motu cognizance of such matters and decide such matters expeditiously after allowing sufficient opportunity to the affected parties of being heard.

17. From a perusal of the aforesaid provision two aspects are quite apparent. Firstly that if the disqualification is from the date prior to the start of election process, such objection should have been raised before the Commission during the election process itself. Secondly that where the matter is with respect of a disputed question of fact, which is contested and contradicted by the concerned person and which requires evidence to decide the same, the Commission has got no authority or jurisdiction to decide the same specially when the process of election has concluded. In such circumstances, only option left for respondent No. 7 was to file an election petition before the prescribed authority under the provision of Section 137 of the Act, which clearly provides that the election to any office of a Gram Panchayat or a Gram Katchahry shall not be called in question except by an election petition as prescribed. The specific wordings of the aforesaid section read with the provisions of Article 243O of the Constitution provided a bar to interference by Courts in electoral matters. It reads as follows:

243-O. Bar to interference by Courts in electoral matter- Notwithstanding anything in this Act-

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituents, made or purporting to be made under Article 243K, shall not be called in question in any Court.

(b) no election to any Panchayats shall be called in question except by an election petition prescribed to such authority and in such manner as is provided for by or under any law made by the Legislature of a State.

18. To sum up the matter, Section 137 of the Act specifically provided that the election to any office of a Panchayat or a Gram Katchahry shall not be called in question except by an election petition as prescribed, whereas, Section 138 of the Act provided that no election to any Panchayat shall be called in question except by an election petition presented to the prescribed authority under the Act, which has been provided in Section 137 of the Act. Section 138 of the Act reads as follows:

138. Bar to interference by Courts in electoral matters-Notwithstanding anything contained in this Act-

(a) The validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 243K of the Constitution of India shall not be called in question in any Court;

(b) no election to any Panchayat shall be called in question except by an election petition presented to the prescribed authority under this Act.

Furthermore, Section 139 of the Act provided the grounds for declaring election to be void by the prescribed authority when the result has been materially affected by the improper acceptance of any nomination; or by any corrupt practice committed in the interests of the returned candidate or on other grounds stated therein. Thus, it is quite clear that the prescribed authority mentioned in the aforesaid provision of law is clearly the authority mentioned in Section 137 of the Act and no one else and hence any application filed after the election process is over before any other authority except the authority prescribed u/s 137 of the Act is not maintainable. Article 243O of the Constitution of India as well as Section 138 of the Act also provides a bar to interference by Courts in electoral matters except by way of an election petition presented to such authority as provided under the law made by the State Legislature.

19. So far the question of eligibility of respondent No. 7 for filing the said complaint before the Commission is concerned, it is quite apparent that she filed her nomination for the post of Pramukh of Banke Bazar Panchayat Samiti and she participated in the election without raising any objection during the entire election and she challenged the result of the said election subsequently only after being defeated. Legally, the claimant (respondent No. 7) was barred from doing so in the aforesaid circumstances as has been held by this Court in the case of Raghuni Nayak (supra).

20. In these circumstances, the challenge being only on the ground of the age of the petitioner, it was nowhere stated by respondent No. 7 either in her complaint before the Commission or in her counter-affidavit filed before this Court that she had no knowledge or information earlier about the age of the petitioner. Hence, after having participated in the election without raising any such objection, respondent No. 7 was legally estopped from challenging the validity of that election after having lost therein. Furthermore, so far question of petitioner's election to the post of Member of Goitha Panchayat is concerned, it is admitted by respondent No. 7 that the latter was neither a candidate for that post nor was she a voter in that constituency and hence she had no occasion to challenge the said election of the petitioner also. In the said circumstances, it is held that the case filed by respondent No. 7 before the Commission was itself not maintainable in the eye of law.

21. With respect to the age of the petitioner, it is quite apparent that the

petitioner claimed her date of birth to be 09.03.1985, whereas, respondent No. 7 claimed that the petitioner was born on 16.11.1985. Respondent No. 7 had challenged the date of birth (09.03.1985) given by the petitioner in her nomination paper (Annexure D) only on the ground of a certificate (Annexure B) issued by the Board with respect to her passing of the matriculation examination in 2001, in which her date of birth was given as 16.11.1985. Apart from the aforesaid certificate, only one document was produced by respondent No. 7 before the Commission, which is an undated application said to be of the petitioner for appointment to the post of Shiksha Mitra. From Annexure "A" to the counter-affidavit filed by respondents No. 2 and 3, it is quite apparent that the said undated application of the petitioner was sent by the Block Development Officer to the Secretary of the Commission on 25.08.2006 much after the declaration of the election result and even after the passing of the impugned order. Furthermore, in the aforesaid circumstances the petitioner having seriously challenged the said document as forged and fabricated, bearing neither her own handwriting nor her signature and nor even there being any occasion for the petitioner to file such an application, there was obvious possibility that the said document was prepared for the purpose of this case only. Hence, without ascertaining the genuineness of the said application, the authority concerned committed serious error in law in relying upon the same and deciding the case on its basis.

22. So far the matriculation certificate of the Board is concerned, it is not in dispute that the date of birth of the petitioner recorded therein was not on the basis of any application or affidavit filed by her parents and hence it had no probative value unless her parents were examined or person on whose information the entry was made, was examined. This view is settled by various decisions of the Hon''ble Apex Court as well as by various High Courts including the judgment of the Hon''ble Supreme Court in the case of Birad Mal Singhvi Vs. Anand Purohit, , in which it was held as follows:

If the entry in the scholar's register regarding date of birth is made on the basis of information given by parents, the entry would have evidentiary value but if it is given by a stranger or by someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value. Merely because the documents Exs. 8, 9, 10, 11 and 12 were proved, it does not mean that the contents of document were also proved. Mere proof of the documents Exs.8, 9, 10, 11 and 12 would not tantamount to proof of all the contents of the correctness of date of birth stated in the documents.

This view also finds support by another decision of the Hon''ble Apex Court in the case of Brij Mohan Singh Vs. Priya Brat Narain Sinha and Others,

23. But without appreciating the requirements of law the authorities neither ever tried to ascertain as to how the date of birth has been recorded in the Board's certificate or in the Scholar's Register, nor any effort was made to examine the parents of the petitioner or any other persons concerned. On the other hand, it

was the petitioner, who produced the affidavit of her father showing her date of birth to be 09.03.1985 and in support thereof, she produced the Admission Register of the Primary School, in which her date of birth was mentioned as 09.03.1985 as declared by her father on 23.01.1989 as well as other documents of the school and her application before the Board for correction of her date of birth forwarded by the Headmaster, all of which showed her date of birth to be 09.03.1985. The fact that the petitioner was above 21 years of age was also proved by the Identity Card issued by the Commission as well as the voter list.

24. In view of the aforesaid facts and circumstances as well as the documents produced by the petitioner, the question of date of birth of the petitioner could not have legally been decided without holding a proper enquiry, examining the parents and other concerned relatives of the petitioner and in absence thereof the documents concerned along with affidavit of the father of the petitioner had to be relied upon. Furthermore, this question being a contested question of fact requiring evidence should not have been gone into by the Commission as the same can only be decided by an appropriate authority prescribed under the law for the purpose.

25. Accordingly, the impugned order dated 09.08.2006 passed by the State Election Commissioner, Bihar, in Case No. 28/06 is hereby quashed and this writ application is allowed. The authorities concerned are directed to reinstate the petitioner on the post of Member of Goitha Panchayat as well as on the post of Pramukh of Banke Bazar Panchayat Samiti.