
(2008) 08 PAT CK 0124
In the Patna High Court
Case No : LPA No. 229 of 2008

Sanjay Kumar @ Sanju Yadav

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 21-08-2008

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2009) 3 PLJR 933

Hon'ble Judges : R.M. Lodha, C.J.;Kishore K. Mandal, J

Bench : Division Bench

Advocate : R.S. Pradhan, Y.V. Giri, Ajay Kumar and Zeaul Hodal, for the Appellant; Ram Balak Mahto and Chakradhari Sharan Singh for the Respondent No. 7, for the Respondent

Final Decision : Dismissed

Judgement

1. Although the matter has come up on the application (I.A. No. 4202 of 2008) for vacation of interim order dated 2nd July, 2008 but since the appeal has not been admitted so far, we heard the senior counsel for the appellant and senior counsel for the respondent No. 7 on merits of the appeal. Bereft of unnecessary details, the following undisputed facts may be noticed first:--

(i) that, notification for election to the post of member, 22-Zila Parishad, Gaya, was published on 30th November, 2007.

(ii) that, pursuant to the aforesaid notification, sixteen candidates filed their nomination, one of which was rejected and fifteen candidates including the present appellant and respondent No. 7 remained in fray;

(iii) that, election was held on 23rd December, 2007, the voting was done through Electronic Voting Machine (EVM);

(iv) that, counting was held on 27th December, 2007, and result was announced by the Returning Officer on that day whereby present respondent No. 7 was

declared returned. A certificate to that effect was issued on that very date i.e. 27th December, 2007;

(v) that, non- functioning/improper functioning of EVM at booth No. 146 was brought to the notice of Returning Officer by the appellant who accordingly informed State Election Commission. The State Election Commission cancelled the certificate issued to respondent No. 7 and thereby the election of the respondent No. 7 and ordered fresh election to be held on 31st December, 2007 at booth No. 146.

(vi) that, on 31st December, 2007 re-polling was held at booth No. 146 and based on the counting of the votes polled at booth No. 146 on 31st December, 2007, the present appellant was declared a returned candidate and certificate was issued on 1st January, 2008.

2. The present respondent No. 7 filed a writ petition before this Court challenging the actions of the State Election Commission and the Returning Officer in cancellation of the certificate issued to him and subsequent issuance of certificate in favour of the present respondent No. 7 and for declaration of the said actions void, unconstitutional and without jurisdiction.

3. The writ petition was contested by the present appellant. A counter affidavit was filed by him on 5th February, 2008. Along therewith a few documents were placed on record.

4. The Single Judge heard the concerned parties and by his order dated 27th February, 2008 allowed the writ petition and quashed and set aside the order of the Election Commission canceling the certificate issued to the present respondent No. 7 and, holding its action beyond jurisdiction. The Single Judge also quashed and set aside the certificate dated 1st January, 2008 issued by the Returning Officer in favour of the present appellant declaring him having been elected. It is this order of the Single Judge that is impugned in the present appeal.

5. Bihar Panchayat Election Rules, 2006 (for short, "Rules, 2006") came into effect on 18th January, 2006. Rule 81 thereof provides for declaration of results which reads thus:--

"Parinamo Kee Ghoshna.--(1) Nirvachi Padadhikari ya pradhikrit padadhikari prapatra 21 men nirvachan parinam ki vivrani ankit kar yathasthiti gram panchayat ko sadasya/gram kachahari ke panch, mukhia, Sarpanch तथा panchayat samiti/zila parishad ke sadasya ke liya us abhyarthi ko, jise adhikram vidhimanya mat mile hain, nirvachit ghoshit karega aur usi prapatra men ise pramanit karega.

(2) Prapatra 21 ki hastakshrit prati zila nirvachan padadhikari ko तथा uske madhyam se ek ek prati ayog ko aur nideshak, panchayat raj ko bheji jayegi."

6. Form-21 has been appended in the Rules, 2006 that provides for declaration

of election results.

7. Rule 82 of the Rules, 2006 provides that the Returning Officer shall grant election certificate in Form-22 to the candidate so elected after the declaration of the election results. Form-22 appended to the Rules, 2006, thus, provides for issuance of election certificate.

8. As noticed above, the result of the election of 22-Zila Parishad, Gaya came to be declared under Rule 81 of the Rules, 2006 by the Returning Officer on 27th December, 2007. The present respondent No. 7 secured the maximum number of valid votes on the basis of the counting and was declared elected. This aspect is not disputed by the appellant. On that very day, the election certificate was issued in favour of the present respondent No. 7 as he was declared elected having secured the maximum number of votes.

9. Legal position is no more *res Integra* that upon issuance of election certificate after declaration of the election result, the election process comes to an end. The authorities including Returning Officer or the State Election Commission become *functus officio* in so far as said election is concerned. Thereafter any challenge to the election, legality or otherwise, has to be brought in by way of election petition or as per the process provided in the relevant law under which election was held. In this backdrop of legal position, once the respondent No. 7 was declared elected having secured maximum valid votes and certificate to that effect was issued to him, his election could have been undone only through the remedy provided in Bihar Panchayat Raj Act and the Rules framed thereunder.

10. However, the present case despite the fact that the result of the election was declared by the Returning Officer on 27th December, 2007 and election certificate under Form-22 as contemplated in Rule 82 of Rules, 2006 was issued to respondent No. 7 having secured maximum valid votes, on the complaint of the appellant that EVM at booth No. 146 did not function properly, the State Election Commission cancelled the certificate issued to respondent No. 7 under Rule 82 (Form-22) of Rules, 2006. We are afraid, the State Election Commission possessed no such power under the provisions of Bihar Panchayat Raj Act, 2006 (for short, "Act, 2006"). It is true that the wholesome provisions concerning the elections are provided in Chapter-VII of the Act, 2006. Section 123, thereof, empowers the State Election Commission for superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayat bodies in the State under the Act, 2006 and the Rules made thereunder, but upon declaration of result and issuance of certificate to a returned candidate, their role comes to an end vis-a-vis such election.

11. Obviously, it is the obligation and duty of the State Election Commission to ensure that the election so held under its superintendence, direction and control are free and fair but, once the election process is complete, concluded and over in all respects, Election Commission is not clothed with the power of undoing the declaration of result. In the scheme of Bihar Panchayat Raj Act, 2006 and the

Rules framed thereunder, those concerned to the election cease to have any power, authority or competence of any nature whatsoever upon issuance of certificate under Rule 82 of Rules, 2006 in relation to that election. Such election can be got undone only through the machinery provided therein and not by the Returning Officer or the State Election Commission.

12. The aforesaid legal position was not in fact put in issue by Mr. Y.V. Giri, the senior counsel, but he submitted that despite any illegality or irregularity having been committed by the State Election Commission in setting aside the election of respondent No. 7, once the re-polling was done at both No. 146, and based on that counting, the appellant secured more votes and he was declared elected and certificate of election having been issued under Rule 82 of Rules, 2006, it was not proper exercise of discretion by the Single Judge in interfering with the action of the Election Commission and quashing the appellant's election. In this connection he relied upon an order of the Division Bench of this Court in the case of Kailash Singh vs. The Bihar State Election Commission and Ors. (L.P.A. No. 661 of 2001) decided on 29th November, 2001 and a Single Bench decision in the case of Brij Nandan Sharma Vs. The State of Bihar, .

13. In the case of Kailash Singh (supra), the Division Bench considered the matter thus:--

"Learned counsel stated the appellant submitted that--the result has been declared and a certificate has been issued in terms of Rules (for short the Rules) framed under the Bihar Panchayat Raj Act, the Returning Officer has no power to review or recall his order and in that view of the matter the cancellation of the certificate and declaration of the result in favour of respondent No. 5 are without jurisdiction. In support of his submission, he relied upon two judgments one of the Apex Court in the case of Dr (Smt.) Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) and Others, and the other of this cause in the case of Bisheshwar Singh vs. Sub-Divisional Magistrate, reported in AIR 1974 Patna 7.

So far as the legal proposition as urged by the learned counsel for the appellant is concerned, it is well settled that the creature of the statute cannot review or recall his order unless the statute so provides in exercise of judgment or quasi-judicial power. So far, as the administrative orders are concerned, they can be reviewed or recalled provided while reviewing or recalling such orders, principle of natural justice are followed. Under the provisions of the Act, no doubt there is not provision that once the result has been declared, the Returning Officer can review or recall the order, but the question which arises for consideration in this case is as to whether in exercise of Article 226 of the Constitution order should be set aside by this court on the said ground.

In this case, the records were called for by the learned Single Judge and it was found that there was clerical mistake and that has been rectified by the Returning Officer. Rule 81 of the Rules itself provides that the Returning Officer

has to declare such candidate successful, who has secured maximum number of votes. The Returning Officer found clerical mistake in the sense that the person, who had secured lesser number of votes, was declared successful. Even if it be assumed that in absence of such power under the Act, the Returning Officer cannot review or recall the result once declared but if this court in exercise of the jurisdiction under Article 226 of the Constitution will interfere with the order" of the Returning Officer, then that interference will amount to allowing the illegality earlier committed to be perpetuated, Thus, it is not a fit case to exercise the equitable jurisdiction in the favour of the appellant.

It is made clear that these observations have been made for the purpose of the disposal of the present appeal and the same will not prejudice or affect the case of the appellant in the election petition challenging the aforesaid order."

14. What has been held by the Division Bench in the case of Kailash Singh is that the High Court, in exercise of jurisdiction under Article 226 of the Constitution, may not interfere with the order if by doing so an illegality is likely to be perpetuated. There cannot be any quarrel to the said proposition, but it cannot be overlooked that there is no place of equity in election laws; these have to be applied as it is and cannot be allowed to be tinkered by equitable consideration and principles. As a matter of fact, in its order in the case of Kailash Singh, the Division Bench made it clear that whatever observations have been made, were for the disposal of the appeal. Obviously, nothing more needs to be read in that order.

15. Similarly, the general proposition reiterated by the Single Judge in the case of Brijnandan Sharma that the High Court does not interfere with an order where quashing whereof may revive an illegal order, admits of no doubt that each case depends on its own facts as to whether a case for invocation of high prerogative jurisdiction, in a particular fact situation, is made out or not.

16. In the present case, as noticed above, the actions of the State Election Commission and the Returning Officer post 27th December, 2007 after declaration of election result and issuance of certificate under Rule 82 of Rules, 2006 to the respondent No. 7, not only amounted to illegality or irregularity but suffered from patent lack of competence, authority and jurisdiction. If the State Election Commission on 31st December, 2007 cancelled the certificate issued to respondent No. 7 when it had no such authority or competence, a subsequent polling on 31st December, 2007 and issuance of certificate to the present appellant on 1st January, 2008 is wholly without jurisdiction and cannot be sustained having no sanction in law. It was an act of sheer lack of legal authority.

17. We are, thus, satisfied that the consideration of the matter by the Single Judge does not call for any interference by us.

18. Letters Patent Appeal is, accordingly, dismissed in limine. Ad interim order dated 2nd July, 2008 stands discharged. This disposes of all pending interim applications including I.A. No. 4202 of 2008.