
(2011) 05 AHC CK 0119

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 22769 of 2011

Smt. Krishna Upadhyay

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 02-05-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 243ZG(b), 361

Penal Code, 1860 (IPC) — Section 120B

Uttar Pradesh Panchayat Raj Act, 1947 — Section 12C, 5A

Citation : (2011) 5 ADJ 792 : (2012) 1 AWC 496

Hon'ble Judges : Ran Vijai Singh, J; Ashok Bhushan, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. Heard Sri Jamwant Maurya, learned Counsel for the Petitioner and learned Standing Counsel.

2. By this writ petition, the Petitioner has prayed for a writ in the nature of quo warranto commanding and directing Respondent No. 6 to vacate the post of Gram Pradhan of Gram Sabha/Gram Panchayat, Hetampur, Block Sakaldeeha, District Chandauli forthwith and to restrain functioning of Gram Pradhan. Further mandamus has been sought directing the Respondent No. 2 to conduct fresh election of Gram Pradhan, Gram Sabha/Gram Panchayat, Hetampur, Block Sakaldeeha, District Chandauli.

3. Respondent No. 6 filed her nomination for the Office of Pradhan and was declared elected on 25.10.2010 and took charge on 3.11.2010. The Petitioner had also filed her nomination and was one of the contesting candidates. After declaration of the result of election, the Petitioner filed Election Petition No. 2 of 2010 u/s 12C of U.P. Panchayat Raj Act, 1947 challenging the election of Respondent No. 6 which election petition is pending consideration.

4. Petitioner's case in the writ petition is that Respondent No. 6 does not fulfill

the qualification for election as Pradhan, she being less than 21 years of age on the date of filing nomination as well as on the date of election. The Petitioner's case is that Respondent No. 6 was not eligible to contest the election and she having not fulfilling the qualification for election as Pradhan, was not entitled to be elected.

5. Learned Counsel for the Petitioner in support of the writ petition contended that Respondent No. 6 having not fulfilling the qualification of age, i.e. 21 years, was ineligible and hence the Petitioner has every right to pray for issue of a writ of quo warranto against Respondent No. 6.

6-7. Learned Counsel for the Petitioner has placed reliance on the judgment of Hon"ble Apex Court in the case of B.R. Kapur v. State of Tamil Nadu and Anr., 2001 (7) SCC 231, as well as two judgments of learned Single Judge of this Court in the case of Smt. Meena Devi v. State of U.P. and Ors., 2010 (9) ADJ 603 and in the case of Dhanai v. State of U.P. and Ors., 2009 (10) ADJ 466.

8. Learned Counsel appearing for Respondent No. 2 Sri S.K. Singh contended that this writ petition for issue of a writ of quo warranto is not maintainable since the Petitioner who is virtually challenging the election of Respondent No. 6 has already filed an election petition u/s 12C of U.P. Panchayat Raj Act, 1947, which is pending consideration. Reliance has been placed by Respondent No. 2 on a Division Bench judgment of this Court in W.P. No. 4567 of 2011 Khem Singh Pachhara v. State of U.P. and Ors., decided on 21.4.2011.

9. We have heard counsel for the parties and perused the record.

10. To get elected or to dispute the election is a statutory right which is governed by the statutory rules. The election on the Office of Pradhan is held in accordance with the provisions of U.P. Panchayat Raj Act 1947 and can be challenged in accordance with the rules namely Uttar Pradesh Panchayat Raj (Settlement of Election Disputes) Rules 1994. The allegations in the writ petition are to the effect that Respondent No. 6 was disqualified and was not entitled to contest the election. Reference has been made to Section 5A of U.P. Panchayat Raj Act, 1947 which provides for disqualification for membership.

11. The Petitioner as noted above has already challenged the election of Respondent No. 6 in Election Petition No. 2 of 2010 which is pending consideration. After filing of the election petition, the Petitioner has now come up in this writ petition praying for issue of a writ of quo warranto. The judgment which has been relied by learned Counsel for the Petitioner in B.R. Kapur's case (supra), specifically paragraphs 52, 54, 78, 79, 80 and 81, was a case in which the appointment of Respondent Ms. J. Jayalalitha as the Chief Minister of Tamil Nadu was challenged. The Respondent was convicted for offences punishable u/s 120B of I.P.C and under the Prevention of Corruption Act 1988 and was sentenced to undergo rigorous imprisonment and pay fine. Against the conviction, appeals were filed in which the sentence of rigorous imprisonment was suspended. The Governor appointed the second Respondent as the Chief

Minister which appointment was challenged on the ground that she was not qualified for appointment, she being already convicted. Hon''ble Apex Court in the said case had held that in the facts and situation of the said case, a writ of quo warranto could be issued against Respondent No. 2. Following was laid down in paragraph Nos. 78 and 79 of the said case:

78. Amongst other points, the learned Counsel for the Respondents submitted that the appointment of Respondent No. 2 as Chief Minister by the Governor, could not be challenged, in view of the provisions under Article 361 of the Constitution, providing that the Governor shall not be answerable to any Court for the exercise and performance of the powers and duties of his office. It was also submitted that in appointing the Chief Minister, the Governor exercised her discretionary powers, therefore, her action is not justiciable. Yet another submission is that the Governor had only implemented the decision of the majority party, in appointing Respondent 2 as a Chief Minister i.e. she had only given effect to the will of the people.

79. Insofar as it relates to Article 361 of the Constitution that the Governor shall not be answerable to any Court for performance of duties of his office as Governor, it may, at the very outset, be indicated that we are considering the prayer for issue of the writ of quo warranto against Respondent 2, who according to the Petitioner suffers from disqualification to hold the public office of the Chief Minister of a State. A writ of quo warranto is a writ which lies against the person, who according to the relator is not entitled to hold an office of public nature and is only a usurper of the office. It is the person, against whom the writ of quo warranto is directed, who is required to show, by what authority that person is entitled to hold the office. The challenge can be made on various grounds, including on the grounds that the possessor of the office does not fulfil the required qualifications or suffers from any disqualification, which debars the person to hold such office. So as to have an idea about the nature of action in the proceedings for writ of quo warranto and its original form, as it used to be, it would be beneficial to quote from Words and Phrases, Permanent Edn. Vol. 35-A p. 648. It reads as follows:

"The original common law writ of quo warranto was a civil writ at the suit of the Crown, and not a criminal prosecution. It was in the nature of a writ of right by the King against one who usurped or claimed franchises or liabilities, to inquire by what right he claimed them. This writ, however, fell into disuse in England centuries ago, and its place was supplied by an information in the nature of a quo warranto, which in its origin was a criminal method of prosecution, as well as to punish the usurper by a fine for the usurpation of the franchise, as to oust him or seize it for the Crown. Long before our revolution however, it lost its character as a criminal proceeding in everything except form, and was franchise, or ousting the wrongful possessor, the fine being normal only; and such, without any special legislation to that effect, has always been its character in many of the States of the Union, and it is therefore a civil remedy only. Ames v. State of Kansas,

12. There cannot be any dispute to the proposition as laid down by the Hon''ble Apex Court in the aforesaid case. In an appropriate case, a person usurping the public office can be asked to show his authority by issuing a writ of quo warranto. The question to be considered in the present case is as to whether in the facts of the present case, the present writ petition for issuing a writ of quo warranto can be entertained. The judgment in the case of Smt. Meena Devi (supra) relied by the Petitioner was a case where the Respondent was elected as Pradhan as a reserved category candidate. The caste certificate which was issued to the Petitioner was cancelled. After cancellation of the caste certificate of Smt. Inder Bala, the elected Pradhan, the writ Petitioner made a request to the District Magistrate that Inder Bala had no right to continue on the post of Pradhan and her continuance is liable to be stopped by issuing a writ of quo warranto. This Court considered the several cases. Following was laid down in paragraph Nos. 14, 15, 16 and 18:

14. The view has been taken that election to the office of Pradhan can be challenged only by way of forum provided for to question the validity of election is by way of election petition u/s 12-C of the Act, as provided for under Article 243-0 of the Constitution, which has overriding effect. There is another facet of the matter and the said facet is that there are two stages of disqualification of a person elected as office bearer of Village Panchayat" (i) if it exists at the time of filing of nomination and continue to exist up to declaration of his result, then such disqualification is to be agitated by way of filing an election petition before the Election Tribunal u/s 12-C of U.P. Panchayat Raj Act" (ii) but if such disqualification is earned by a person after filing of nomination paper and declaration of results, then State Legislation has authority to make law disqualifying such an incumbent as a member of Panchayat.

15. Hon''ble Apex Court in the case of Kurupati Maria Das v. Dr. Ambedkar Sewa Sansthan and Ors., after taking into account the judgment of Hon''ble Apex Court in the case of K. Venkatchalam v. A. Swamickan, Jaspal Singh Arora v. State of M.P., Gurdeep Singh Dhillon v. Satpal and Ors., has taken the view that election cannot be under challenge to a writ of quo warranto, but subsequent continuance of such a person in his capacity as a person belonging to that particular caste can always be subject-matter of challenge and writ of quo warranto would lie, in paragraph 22 of judgment word of caution is there, that in the garb of writ petition of quo warranto, question of caste and question of election which are so inextricably mixed, cannot be permitted, as in pith and substance, it is nothing but questioning the validity of election. High Court itself cannot take up the issue of deciding the question of caste. The law on the subject, thus, stands clarified that writ of quo warranto would lie in a case wherein subsequent continuance of such a person in his capacity as a person belonging to that particular caste is an issue and the same can always be subject-matter of challenge. In paragraph 27 wherein inaction was complained of, on behalf of authorities enjoined upon to

decide the issue of caste u/s 5 of 1993 Act has been dealt with inclusive of the issue of consequence of cancellation certificate as follows:

That was done. If that application had been decided upon and concerned authority had found that Appellant's caste certificate itself was false and fraudulent and he genuinely did not belong to Scheduled Caste, then that itself could have been enough for the Appellant to loose the post that he was elected to. In our opinion, it is necessary to get examined the Caste certificates of all the elected persons from reserved constituencies within a time frame to avoid such controversies.

16. In the aforementioned judgment, a thin line of distinction has been drawn for challenging the election which was open till declaration of result, and qua the disqualification occurred subsequent to the same, i.e. after filing nomination papers and declaration of result, then certainly, situation cannot be left at the prerogative of the authority and in appropriate matters Court can always issue writ of quo warranto, when it is established that the person who holds the post of an independent substantive public office, by what rights he holds the office, so that his title is duly determined, and in case, it is found that holder of the office has no title, he should be ousted from the office by a judicial order. Procedure of quo warranto comes under judicial remedy, but control of executive from making appointment to public office cannot be taken away. It protects such persons from being deprived of the public office, who has right. A person can avail the remedy of writ of quo warranto by satisfying the Court that the office in question is public office and the same is held by usurper without legal authority, and on inquiry as to whether the appointment of the said usurper had been made in accordance with law or not, the authority of quo warranto is thus judicial remedy to undo a wrong when public office is involved and the incumbent who is holding the office, same is without any authority of law.

18. The larger question involved in the present case is that the candidate Smt. Inder Bala claiming herself to be Scheduled caste, obtained certificate contested the election and was declared elected. On subsequent inquiry by Tehsildar, it was found that the very foundation and basis of her caste certificate was incorrect and the same has been cancelled on 24.4.2008 by the Tehsildar. While proceeding to cancel the caste certificate she has proceeded to mention that Smt. Inder Bala is from Kahar/Kamkar category which is recognized as O.B.C. in the State of U.P. and only in order to derive benefit of Scheduled Caste category she has been claiming herself to be from Kharwar in this background order has been passed. This Court also while deciding election petition in *Poornmasi Dehati v. Shambhu Chaudhary*, has taken the view that Kamkar is not sub-caste of Kharwar, which is the Scheduled caste. Kamkar is not mentioned in 1950 Scheduled Castes order. Can even in such a situation remedy of election petition be availed. Such remedy could have been availed, had the order of cancellation been passed prior to the declaration of result, but here, in the present case, elections had taken place and result had been declared and the office was being

held, then on inquiry it had been found that Smt. Inder Bala was not from Scheduled caste category candidate. Once Smt. Inder Bala was not from Scheduled caste category candidate, then it is not at all that her election is under challenge, but her subsequent continuance in the said capacity as a person not belonging to that particular caste is subject-matter of challenge. Hon''ble Apex Court in the case of Kurupati Maria Das (supra), as quoted above, has itself proceeded to mention, if the application for cancellation of caste certificate had been found that Appellants caste certificate itself was false and fraudulent and she genuinely did not belong to Scheduled caste, then that itself could have been enough for the Appellant to loose the post that she was elected. Case in hand is falling in the said category as here certificate has been canceled by the competent authority. Hon''ble Apex Court in such a situation has taken the view that writ of quo warranto would lie.

13. In the aforesaid case, it has been laid down that a writ of quo warranto would lie in a case wherein subsequent continuance of a person in his capacity belonging to a particular caste is an issue. In paragraph 16 it has been laid down that when disqualification occurred subsequent to the filing of nomination, writ of quo warranto shall lie. In another judgment in Dhanai''s case (supra) which was a case of conviction of the elected candidate, the Court issued writ of quo warranto relying on the judgment of Hon''ble Apex Court in the case of K. Venkatachalam Vs. A Swamickan and Another, The Court held that writ petition under Article 226 of the Constitution of India shall be clearly maintainable even when there was a provision for filing of an election petition. Following was laid down in paragraph Nos. 14, 17 and 18.:

14. A perusal of the aforesaid decision leaves no room for doubt that the Article 226 of the Constitution of India would be clearly maintainable even if there was a provision for filing of an election petition.

17. In the instant case, there being no doubt about the admitted position of disqualification having been incurred by the Respondent No. 7, there is no occasion for this Court to dismiss the writ petition on the ground of availability of any other alternative remedy. Apart from this, it is evident that the Respondent No. 7 had been restrained by this Court by an interim order commanding the opposite parties not to allow the said Respondent to function as Gram Pradhan. It is to be noted that the order was passed by this Court on 25th July, 2007 whereas the District Magistrate took 5 months to pass a consequential order. The aforesaid situation is absolutely unfortunate, inasmuch as, the authorities are required to obey the orders forthwith without any hesitation. It is not understood as to why the District Magistrate took 5 months to obey the command of this Court.

18. In view of the aforesaid conclusion drawn and in view of the fact that the Respondent No. 7 admittedly suffers from an inherent disqualification as provided u/s 5-A, a declaration is hereby issued that the election of the Respondent No. 7 as Gram Pradhan was illegal and invalid and he shall not be

construed to hold the public office of Gram Pradhan of Gram Panchayat Muriari, District Ghazipur forthwith as it stands accordingly annulled. The impugned order dated 30.3.2007 is also quashed.

14. The Division Bench judgment which has been relied by learned Counsel for the Respondent was also a case where writ of quo warranto was prayed for against the elected member of Kshetriya Panchayat on the ground that she was not eligible to contest the election having been working as Anganbari Worker. A Division Bench of this Court relying on the judgment of Hon'ble Apex Court in the case of Kurupati Maria Das v. Dr. Ambedkar Sewa Sansthan and Ors., JT 2009 (7) SCC 287, held that the remedy was to challenge the election by means of an election petition. The Division Bench also noticed that election petition was already filed against the election of the member of Kshetriya Panchayat which was pending. It is useful to quote the following observations of the Division Bench judgment:

In Kurupati Maria Das (supra) a writ petition was filed under Article 226 of the Constitution challenging the election of Appellant as a Councilor. The ground of challenge was that the Appellant contested the election as a Scheduled Caste Candidate "Mala" whereas he did not belong to scheduled caste and had wrongly been elected as scheduled caste candidate. The learned single judge allowed the writ petition holding that the Appellant was not entitled to contest the election as scheduled caste category candidate. The writ petition was allowed and the Special Appeal filed before the Division Bench was also dismissed. The Appellant thereafter filed SLP (C) No. 15144 of 2007, in the Apex Court which was heard and decided.

In the aforesaid case, the question as to whether the election was barred under Article 243ZG(b) of the Constitution of India was also raised and gone into by the Apex Court. In the aforesaid case, the Apex Court judgment in K. Venkatachalam Vs. A Swamickan and Another, was also noted and distinguished. The Apex Court laid down following in paragraphs 27, 29, 31 and 34 which are quoted below:

27. We are afraid, we are not in position to agree with the contention that K. Venkatachalam Vs. A Swamickan and Another, , is applicable to the present situation. Here the Appellant had very specifically asserted in his counter-affidavit that he did not belong to the Christian religion and that he further asserted that he was a person belonging to the Scheduled Caste. Therefore, the Caste status of the Appellant was a disputed question of fact depending upon the evidence. Such was not the case in K. Venkatachalam Vs. A Swamickan and Another, Every case " is an authority for what is actually decided in that. We do not find any general proposition that even where there is a specific remedy of filing an Election Petition and even when there is a disputed question of fact regarding the caste of a person who has been elected from the reserved constituency still remedy of writ petition under Article 226 would be available.

29. Shri Gupta, however, further argued that in the present case what was

prayed for was a writ of quo warranto and in fact the election of the Appellant was not called in question. It was argued that since the writ Petitioners came to know about the Appellant not belonging to the Scheduled Caste and since the post of the Chairperson was reserved only for the Scheduled Caste, therefore, the High Court was justified in entering into that question as to whether he really belongs to Scheduled Caste.

31. It is an admitted position that Ward No. 8 was reserved for Scheduled Cast and so also the Post of Chairperson. Therefore, though indirectly worded, what was in challenge in reality was the validity of the election of the Appellant. According to the writ Petitioners, firstly the Appellant could not have been elected as a Ward member nor could he be elected as the Chairperson as he did not belong to the Scheduled Caste. We can understand the eventuality where a person who is elected as a Scheduled Caste candidate, renounces his caste after the elections by conversion to some other religion. Then a valid writ petition for quo warranto could certainly lie because then it is not the election of such person which would be in challenge but his subsequently continuing in his capacity as a person belonging to a particular caste.

34. Once it is held that the aforementioned case was of no help to the Respondents, the only other necessary inference which emerges is that the bar under Article 243-ZG would spring in action.

The Apex Court in the said judgment has also noticed the submission as to whether the writ of quo warranto can be issued when an incumbent is holding an elected office by virtue of election. The answer was given in negative. It was held that challenge essentially is to the election of the Appellant and hence the bar under Article 243ZG is attracted. The appeal was allowed and the judgment of the High Court was set-aside. The above judgment of the Apex Court applies in the facts of the present case and in view of the law laid down by the Apex Court in Kurapati Maria Das case (supra), the writ petition cannot be entertained. The Division Bench judgment relied on by the learned Counsel for the Petitioner in the case of Srimati Sarita Devi (supra) does not help the Petitioner in the present case. The said judgment is an authority that an Anganbari Workers are disqualified from contesting the election of Panchayat and they are not eligible to contest the Panchayat election, but the said case was not a case challenging any election, but the question which was considered in the said case was whether the State Election Officer has any right to debar the Shiksha Mitra/Anganbari Worker from contesting the Panchayat Election and, whether the honorarium received by Shiksha Mitra and/or Anganbari workers for rendering their respective services falls within the purview of "office of profit." There cannot be any dispute to the propositions as laid down in the said case. However, the said judgment does not help the Petitioner in the present case, and it is not an authority for the proposition to hold that election of an elected member of Kshettra Panchayat can be challenged by filing a writ of quo warranto.

In view of the foregoing discussion, we are satisfied that the Petitioner cannot be

allowed to challenge the election of Respondent No. 8, by means of this writ petition under Article 226 of the Constitution of India.

The writ petition has no merit and is dismissed.

15. In view of the foregoing discussion, it is clear that when the challenge in the petition is essentially the challenge to the election of an elected candidate for which remedy is to file an election petition, this Court normally does not entertain a writ of quo warranto. In the present case, the Petitioner herself has filed Election Petition No. 2 of 2010 challenging the election of Respondent No. 6 which is pending consideration. After filing the election petition, the Petitioner has come up by praying for a writ of quo warranto. The issue which has been raised in the writ petition that Respondent No. 6 was not eligible to contest the election is the issue in the election petition which can very well be gone into in the election petition and decided. In the facts of the present case and in view of the Division Bench judgment in the case of Khem Singh Pachhara (*supra*), we are of the view that the present writ petition for a writ of quo warranto need not be entertained.

16. In view of the foregoing discussion, this writ petition praying for a writ of quo warranto cannot be entertained and is dismissed accordingly.