

(2011) 03 AHC CK 0365

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 6125 of 2010

Smt. Shahista

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 17-03-2011

Acts Referred:

Constitution of India, 1950 — Article 192, 226, 227, 243ZF, 243ZG

Citation : (2011) 4 ADJ 805 : AIR 2012 All 35 : (2011) 4 AWC 3345 : (2011) 2 UPLBEC 1267

Hon'ble Judges : Sunil Ambwani, J;K.N. Pandey, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. We have heard Shri P.N. Saxena assisted by Shri Amit Saxena for the Petitioner. Learned Standing Counsel appears for the State Respondents. Shri S.N. Fazal appears for Smt. Nisha Kumari, the newly impleaded Respondent No. 4.

2. The Petitioner contested the elections to the office of the Chairman, Nagar Palika Parishad, Thakurdwara reserved for Other Backward Class persons in October, 2006. She was elected for five years and assumed the office.

3. Smt. Nisha Kumari Respondent No. 4, the defeated candidate made a complaint to Tehsildar, Tehsil Thakurdwara, Distt. Moradabad alleging that the caste certificate dated 10.10.2005 issued to the Petitioner certifying that she belongs to "Bhisti" caste included in the list of OBC in the State of U.P. notified under the U.P. Public Services (Reservation for SC, ST and OBC) Act, 1994 as amended in 2001, and in the year 2002 is fraudulent as she is not of "Bhisti" caste by birth. Since the Tehsildar Tehsil Thakurdwara, Moradabad had issued the certificate on the basis of certificate issued by the Tehsildar Tehsil Sayana Distt. Bulandshahar, where she was born and brought up to the Petitioner, the matter was referred to the Tehsildar, Sayana. The Sub Divisional Magistrate, Sayana got an enquiry conducted from Tehsildar Sayana and informed the District Magistrate

of the District Bulandshahar that the caste certificate No. 17882 dated 3.10.2005 issued to Smt. Shahista, daughter of Rahimuddin, Village Chandiana (the Petitioner) is valid. The "family register enclosed with the complaint was examined by Shri Bhim Singh Sharma, the then Gram Panchayat Vikas Adhikari. He verified his signatures and found that according to the inspection report of Tehsildar Sayana the caste certificate has been correctly issued.

4. Smt. Nisha Kumari and Mohd. Sharif Saifi, the other defeated candidate, filed Election Petition No. Nil of 2006 and 12 of 2006 respectively in the Election Tribunal challenging the election of Petitioner on various grounds including that the Petitioner is not "Bhisti" by caste belonging to OBC and was thus disqualified to contest the elections.

5. Smt. Nisha Kumari and Mohd. Sharif Saifi were not satisfied with the enquiries made by the Sub Divisional Magistrate, Sayana Distt. Bulandshahar. They again made a complaint to the district authorities on which once again a report was sought from the District Magistrate, Bulandshahar and Sub Divisional Magistrate, Sayana and once again the District Magistrate, Bulandshahar and Sub Divisional Magistrate, Sayana submitted a report on 13.2.2007, that the complaint is baseless.

6. It is alleged by Shri P.N. Saxena, learned Counsel for the Petitioner that as soon as the political scene changed in the State of U.P. in May, 2007 and Bahujan Samaj Party came into power, Smt. Nisha Kumari made a representation to the Chief Minister of the State of U.P. The District Magistrate was prompt in directing a fresh enquiry to be made on the same day on 7.6.2007 on which the complaint was received. It is alleged that without issuing any show cause notice or giving any opportunity of hearing to the Petitioner, the caste certificate was cancelled on 24.8.2007.

7. The Petitioner challenged the order dated 20.8.2007 passed by the Tehsildar, Thakurdwara Distt. Moradabad cancelling caste certificate dated 3.10.2005 and the another order of the Tehsildar, Thakurdwara dated 24.8.2007 cancelling certificate dated 10.10.2005, in Writ Petition No. 41067 of 2007. By an interim order dated 1.9.2007 the effect and operation of both the orders were stayed. Another Writ Petition No. 42640 of 2007 was filed by one Mohd. Umar claiming himself to be the elector for writ of quo warranto against the Petitioner. Both the writ petitions were connected and disposed of finally by the judgment dated 1.7.2009. A Division Bench of this Court relying upon Gulzar Singh Vs. Sub-Divisional Magistrate and Another, held that the caste certificate could not be cancelled without issuing notice to the Petitioner. The principle of natural justice was violated and thus the writ petition was liable to be allowed. While setting aside the impugned orders the High Court directed as follows:

In view of the aforesaid, both orders cannot be sustained and are hereby set-aside. However, it shall be open to the competent authority to pass fresh order after giving opportunity to the Petitioner in accordance with law. We are not

expressing any opinion on the merit of the case regarding caste certificate of the Petitioner nor the observation made in this order shall effect the consideration on merits in the pending Election petition.

With the aforesaid directions, the writ petition is disposed of finally.

8. In pursuance to the orders passed by the High Court a show-cause notice was issued by the Tehsildar, Sayana, Distt. Bulandshahar to the Petitioner on 27.8.2009 to appear before him on 9.9.2009 at 11.00 a.m. to present her case. The Petitioner appeared before the Tehsildar and examined her father Shri Rahimuddin son of Noor Mohammad resident of Village Chandiana. In his statement he stated that he is resident of Village Chandiana and is labourer by occupation. Smt. Shahista is her daughter. He is "Bhisti" by caste, which is OBC. His daughter Smt. Shahista is also "Bhisti" by caste. He got his daughter married to Shri Nawab Jan of Thakurdwara Distt. Moradabad. The caste certificate issued to her daughter is correct. The complaint against her caste is incorrect and that earlier also an enquiry was made in which he and his daughter were verified to belong to OBC. Similar statements were given by Shri Taiyab Khan, Shri Zakir, Shri Asif Khan, Shri Ali Ahmad of the same village in favour of the Petitioner. The Petitioner did not submit any documentary evidence in support of her case.

9. The Sub Divisional Magistrate, Sayana submitted a report to the District Magistrate, Bulandshahar on 20.8.2007. In this report the Sub Divisional Magistrate has referred to averments in the complaint in which a request has been made to examine the nikahnama, school marksheet, parivar register and also the fact whether there are two persons in the village by the name of Rahimuddin. The Sub Divisional Magistrate found that there are two sets of parivar registers and there is contradiction in the copies of the parivar register of Shri Rahimuddin son of Shri Noor Mohammad. There is only one family of Rahimuddin, whereas two different copies of parivar register have been issued. In another copy of the parivar register Shri Mushir Ali Khan also known as Dr. Saddam Khan, Smt. Shahista is entered as his daughter. In this parivar register Shahista is entered as born in 1974. In this register she is shown to be illiterate, belonging to caste "Pathan", and occupation agriculture. The residents of the village also know her by the name of "Juli". The Sub Divisional Magistrate, thereafter, referred to the voter list and the school records. In the voters list in the house of Rahimuddin in para No. 217, house No. 35 SI. No. 189 to 198 the name of Shahista is not entered. In the voters list of part No. 219, house No. 527 at SI. No. 808 the name of Shri Mushir Ahmad Khan, Bashir Ahmad Khan and his family entered, and in which the name of Shahista is shown. In the Primary School, Chandiana her name was entered by the Principal recording her admission on 1.7.1989, at Serial No. 1002. She passed Class-V in 1990, and obtained a transfer certificate No. 51493 dated 2.7.1990 and got admitted into R.A. Junior High School, Kashipur Bulandshahar in Class-VI, where her name is entered in the admission register at Serial No. 1845. She passed Class-VI 11 examination on 30.6.1993. In all these school registers her father's name is

shown as Dr. Mushir Ahmad Khan and religion as "Islam". The Sub Divisional Magistrate found that in the school records her name is entered as Shahista Khanam and in the electoral list as Shahista Parvin. She is sister's daughter of the Gram Pradhan Chandiana. All the villagers accepted that she is the same Shahista but they were not prepared to give anything in writing. He came to conclusion that one page of parivar register was torn and placed at another place. The parivar register was not maintained properly and there were several discrepancies in the entries. The Sub Divisional Magistrate reported that Smt. Shahista is "Pathan" by caste. She is daughter of Shri Mushir Ali Khan. The then Lekhpal and Asstt. Registrar Kanoongo have falsely entered her name in the parivar register as daughter of Shri Rahimuddin. They have committed gross negligence in performance of their duties. The Tehsildar, Sayana on the basis of aforesaid report passed an order on 4.12.2009 cancelling her caste certificate. On the basis of the orders by the Tehsildar, Sayana of District Bulandshahar, the Tehsildar Thakurdwara, District Moradabad, where she is settled after her marriage to Shri Nawab Jan, a "Pathan" by caste also cancelled the caste certificate on 9.12.2009. The caste certificate issued by the Tehsildar, Thakurdwara, Distt. Moradabad was based on certificate by Tehsildar Sayana, District Bulandshahar.

10. Learned Counsel for the Petitioner submits that he was not given copy of the enquiry report of the Sub Divisional Magistrate, Sayana, annexed to the counter affidavit. He has, however, filed a reply of the Petitioner to the order passed by the Tehsildar, Sayana and Tehsildar, Thakurdwara.

11. Shri P.N. Saxena, learned Counsel for the Petitioner submits that the Petitioner was not given sufficient opportunity to defend herself. The entire enquiry was concluded on a single day. She was not allowed to lead documentary evidence and that in any case the Tehsildar as an executive officer could not have cancelled his earlier order. He had no powers to take evidence and to decide the question of caste of the Petitioner specially when the similar issue was pending before the Election Tribunal. Shri Saxena has relied upon the judgment of the Supreme Court in Smt. Ranjana Sature Vs. The State of Maharashtra and Others and Kurapati Maria Das Vs. Dr. Ambedkar Seva Samajan and Others,

12. Learned Standing Counsel submits that the Petitioner has played fraud with the system. She obtained a false caste certificate on the basis of a manipulated parivar register. The Petitioner professes "Islam" as religion and is "Pathan" by caste, which is not notified as OBC. She succeeded twice misleading the Tehsildar, Sayana, in verifying her caste certificate based on fraudulent evidence. In the subsequent enquiry made, in pursuance to the directions issued by the High Court in writ petition filed by the Petitioner Smt. Shahista, she was allowed full opportunity to defend herself. She was represented by a counsel, who led oral evidence. She did not request for filing documentary evidence nor filed any document to support her case before the Tehsildar, Sayana and the Sub Divisional Magistrate. She has also not filed any document to support her case in

the writ petition. The Tehsildar has correctly found that she is daughter of Shri Mushir Ahmad Khan and is sister's daughter of the Pradhan of Village Chandiana Tehsil Sayana. She has nowhere stated in the writ petition that she is not illiterate and has not disclosed her qualifications. She has studied upto Class-VIII. Her name is entered in the parivar register, electoral roll and school records as daughter of Shri Mushir Ahmad Khan. She got married in her own caste to Shri Nawab Jan Khan, Muslim Pathan residing at Thakurdwara. She has misled the authorities and could not have contested the elections on the seat reserved for OBC.

13. Shri S.N. Fazal, learned Counsel for the Respondent submits that though the election petitions are pending, the complaints made by Smt. Nisha Kumari were considered by the Sub Divisional Magistrate and that it was found after a detailed enquiry that the Petitioner has played fraud by manipulating the parivar register. After a detailed enquiry made in pursuance to the directions of this Court, in which the Petitioner participated without any protest, the Sub Divisional Magistrate has recorded findings of fact that the Petitioner had obtained a false caste certificate. She manipulated the parivar register by getting the pages replaced. She is daughter of Musheer Ahmad Khan and had taken education upto Class-VI in the village. Her name is recorded both in the voters list as daughter of Musheer Ahmad Khan and in the school records. She has not denied schools records and has deliberately not annexed the detailed order of the Sub Divisional Magistrate to avoid denials.

14. In Smt. Ranjana (Supra) the Supreme Court did not accepted the Appellant's petition questioning the correctness of the order of the Caste Scrutiny Committee. The findings of the Committee that she is not S.C. were essentially held to be findings of fact. The entry regarding her baptism was not found by the Supreme Court to be per se proof of the fact that her parents had also converted to Christianity, and thus the matter was remanded.

15. In Kurapati Maria Das (Supra) the Supreme Court considered the bar under Article 243ZG(b) and held that where the caste of a person contesting the election is challenged, the only remedy available is to challenge the election by filing election petition and not a writ petition under Article 226/227 of the Constitution. Article 243ZG reads as follows:

243ZG. Bar to interference by Courts in electoral matters.? Notwithstanding anything in this Constitution:

(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 243ZF shall not be called in question in any Court;

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

16. The Supreme Court held that the bar under Clause (b) of Article 243ZG is absolute. Normally where such bar is expressed in a negative language, it is to be held that it is mandatory and is absolute. In *Jaspal Singh Arora Vs. State of M.P. and Others*, and *Gurdeep Singh Dhillon v. Satpal and Ors.* (2006) 10 SCC 616, it was observed that short-cut of filing writ petition and invoking constitutional jurisdiction of the High Court under Article 226/227 is not permissible. The only remedy available to challenge the election is by raising election dispute under legal statutes.

17. The Supreme Court also referred to *K. Venkatachalam Vs. A Swamickan and Another*, where writ of quo warranto was sought against the member of legislative assembly on the ground that his name was not found in the voters list and in *Election Commission, India Vs. Saka Venkata Subba Rao* and, in which considering Article 192 the Supreme Court observed that Article 226 is couched in widest possible language and unless there is a clear bar to the jurisdiction of the High Court, the power under Article 226 can be exercised. The Supreme Court observed that the judgment in *K. Venkatachalam* (Supra) is not applicable in the situation and there was no general proposition that even if there is specific remedy of filing an election petition, the disputed questions of fact regarding caste of a person can be decided under Article 226 of the Constitution of India. There was another distinguishing feature in *K. Venkatachalam*. In that case there was clear finding that elected person therein had played fraud with the Constitution in as much as he knew that his name was not in the electoral roll of that constituency and he impersonated for some other person taking benefit of the similarity of names. The Supreme Court held in *Kurapati Maria Das* that where the remedy of election petition is provided under the local laws, in view of the bar created by Article 243ZG(b), writ petition should not be entertained and further disputed questions of fact regarding caste, status cannot be looked into in a writ petition.

18. In the present case the election petition challenging the elections of the Petitioner as Chairman of Nagar Palika Parisad, Thakurdwara on the ground that she does not belong to OBC, is pending. The complaint to the issuance of false caste certificate was made by Smt. Nisha Kumari on 10.10.2005, prior to the elections were held in the year 2006, and the Petitioner was elected as Chairman of Nagar Palika Parishad. In the first enquiry the caste certificate was verified to be valid. In the second enquiry also the Sub Divisional Magistrate found that the caste certificate were issued by the Tehsildar, Sayana and Tehsildar Thakurdwara and that there was no mistake in issuing caste certificate. The election petitions were filed and were pending. Smt. Nisha Kumari and Modh. Sharif Saifi were not satisfied with the enquiry and again made complaint of the fraud played by the Petitioner in issuing caste certificate. In this third attempt, the caste certificates were cancelled on which the Petitioner herself filed a writ petition No. 42640 of 2006, in which she did not take a plea nor the counsels appearing for her argued that the matter can be examined only in election petition. The bar of Article 243ZG(b) was not invoked. The High Court in its judgment dated 1.7.2009 relied

upon the judgment of the Supreme Court in Guljar Singh's case (Supra) and set aside the orders (at the instance of the Petitioner) by which the caste certificates were cancelled. The High Court directed a fresh enquiry to be made after giving opportunity to the Petitioner in accordance with law. The judgment dated 1.7.2009 was not challenged and became final. The Petitioner participated in the enquiry. Her counsel examined the witnesses in support of her case and did not raise any plea with regard to bar created by Article 243ZG(b) to stop the enquiry. She took up the plea of the pendency of the writ petition only after the enquiry report was submitted against her. The Tehsildar Sayana, Bulandshahar and Tehsildar, Thakurdwara Distt. Moradabad cancelled her caste certificate on the basis of the enquiry report of the Sub Divisional Magistrate, Sayana to the District Magistrate, Bulandshahar recording the findings on overwhelming evidence, and confirming the fraud played by her in obtaining a false caste certificate.

19. In the aforesaid circumstances, we are of the opinion that though there is a bar under Article 243ZG(b) to challenge the elections in any other forum, the question of adjudication of fraudulent caste certificate was got examined by the competent authorities and that at the instance of the Petitioner, fresh enquiry was directed in which, after a detailed fact finding enquiry associating the Petitioner and giving her opportunity to defend herself, it was found that she has played fraud in obtaining false caste certificates.

20. The Petitioner has not denied the entries in the voters list and the school records which clearly establish that she is daughter of Musheer Ahmad Khan, a Pathan by caste and that she has studied in the village school upto Class-V and thereafter at R.A. Junior High School, Kashipur in Class-VI. The caste certificates were issued on the basis of parivar register, which was found to be manipulated. Some pages were torn and inserted in other place. The voters list clearly demonstrated that she is daughter of Musheer Ahmad Khan and is sisters' daughter of the Pradhan of the village. The Petitioner has not challenged the correctness of these records in the writ petition nor has amended the writ petition, if she was not aware of the report of the Sub Divisional Magistrate annexed to the counter-affidavit.

21. Article 243ZG(b) places a bar on the challenge to any election to any municipality. The bar is not applicable to challenge the caste certificate, if enquiry to the validity of the certificate was initiated prior to the elections and was made at the instance of the Petitioner in pursuance to direction issued in the writ petition. The cancellation of caste certificate may have a bearing on the election of the Petitioner but that where a person has played a fraud, she should not be allowed to reap the benefits and to claim protection of bar to the challenge of her elections.

22. In the present case we are concerned with the validity of the caste certificate and not its effect on the elections. The contesting Respondents have not made any prayers to set aside the election of the Petitioner. It is the Petitioner, who has

challenged the orders cancelling her caste certificate. The effect of the cancellation of caste certificate will be seen by the Election Tribunal in which her elections are under challenge.

23. The writ petition is dismissed.