
(2001) 03 PAT CK 0005
In the Patna High Court
Case No : C.W.J.C. No's. 2276 of 2001

Sri Chand Prasad and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 13-03-2001

Acts Referred:

Constitution of India, 1950 — Article 226, 239B, 329, 329(b)
Representation of the People Act, 1951 — Section 14, 66

Citation : (2001) 2 PLJR 227

Hon'ble Judges : Aftab Alam, J

Bench : Single Bench

Advocate : Durgesh Nandan, Ravindra Prasad Singh, Sunil Kumar Singh, Vinod Kumar Singh, Nirmal Kumar Singh, Sheo Shankar Azad, A.K. Arun, Naresh Chandra Verma, S.K. Griyaghey, Hari Narain Singh, Ramesh Kumar Agrawal and A. Prakash Sahay, for the Appellant; Ganga Prasad Roy for State and Mr. Kumar Brajendra Nath for the Commission and Mr. Ram Balak Mahto, Amicus Curae, for the Respondent

Final Decision : Dismissed

Judgement

Aftab Alam, J.—In each of these writ petitions comprising this batch complaint is made that names of persons having voting right have been left out, in small or large numbers, from the voters' list prepared for the respective Gram Panchayats for the coming Panchayat elections. Apart from the cases in this batch there are many more cases on the list before this court making the same grievance. Before proceeding further, it may be stated that elections for the local bodies (Gram Panchayats) and Zila Parishads) are going to be held in this State after a gap of 22 years. It may also be noted that the necessary will and the drive which made the coming elections possible came from the order passed by this court in Nand Kishore Singh Vs. The Union of India and Others, Needless to say, therefore, it is of the utmost concern of this court that the elections are held on schedule, as fixed by the electoral authorities, and that nothing be allowed to happen that might cause obstruction or delay in the holding of the elections. At

the same time this court is equally concerned that the elections should be meaningful and at the conclusion of the election process all the efforts and expenses may not appear to have been futile and a waste.

2. It is also to be stated here that with the announcement of elections cases in large numbers started coming to this court making grievances of different kinds in connection with the coming elections. These cases can be broadly classified in three categories.

3. In the first category were cases raising grievances about the location of polling booths. In those cases it was generally alleged that the concerned electoral officers, in league with the dominant individual, group or caste in the respective Gram Panchayats were setting up polling booths at places where it would be impossible or very difficult for the weaker groups or sections to cast their votes. The location of the polling booths, according to allegations, was determined with a view to unduly favour an individual, group or caste. In some cases allegations were of a serious nature. It is, however, obvious that such allegations, purely based on local facts, could not be properly examined in a writ petition and in case such disputes were allowed to be opened before the High Court, it would have been impossible for the concerned authorities to hold the elections. Hence, all such cases, without exception, were dismissed by this court in limine, leaving it open to the petitioner in those cases to approach the electoral officers for any relief(s) that they might give them in accordance with law.

4. In the second category were cases in which complaints were made regarding re-constitution of Panchayats under the Bihar Panchayat Raj Act, 1993. It was stated that a particular village was wrongly put in one or the other Gram Panchayat and the formation of the Panchayat area was made in violation of the provisions of the Act or the Rules made there-under. It was felt that at this stage any interference by this court on the issue of delimitation of Panchayat areas would be bound to dislocate the schedule for the coming elections and would cause indefinite delay in holding the elections. Therefore, all those cases too were dismissed without any interference by this court, though making it clear that the dismissal of the writ petition would not extinguish the grievances regarding re-constitution of the Panchayat and after the elections are over, it would be open to the aggrieved person(s) to raise those grievances before an appropriate forum and depending upon the validity of the grievances remedial measures may be directed to be taken, in accordance with law.

5. In the third category of cases, such as those in hand, complaint was made that voters, in substantial numbers, were excluded from the voters' list prepared for the Panchayat elections. These cases the court was unable to throw out on the threshold because the mistake pointed out in the election process was such as could be fully demonstrated and established without difficulty and, more importantly, it was likely to directly undermine the election results. Dealing with this category of cases, therefore, the court was prima facie of the view that having regard to the gravity of the error being complained of, it was essential to

find out some remedial measure without disturbing the election schedule. But the court was then confronted with the question whether, keeping in view the constitutional scheme, it would be lawful, valid and proper for it to interfere in this matter after the election process was put into motion. Equally important was the question of moulding suitable directions to the concerned authorities that would remedy the error without disturbing the election schedule.

6. On these and other allied issues this court heard a number of lawyers appearing in support of the different writ petitions in which the main issue was the omission of voters in large number from the voters' list; the court also heard Mr. A.A.G. Ill and Mr. Kumar Brajendra Nath appearing for the State Election Commission. The court also got the view of the State Election Commissioner who personally appeared in this matter on the request of the court. Further, the court was greatly benefitted by the assistance given by Mr. Ram Balak Mahto, who appeared as *amicus curae* on the courts' request.

7. Before examining how far it would be lawful, proper and desirable for this court to give directions in connection with the election process, it would be useful to clearly understand the nature of the error and the possible implications if the error is left un-remedied.

8. The Panchayat elections are to be held under the provisions of the Bihar Panchayat Raj Act, 1993 and the Bihar Panchayat Election Rules, 1995 framed u/s 121 of the Act. Rules 19 to 25 under Chapter 4 of the Rules lay down the procedure for preparation of the voters' list. Rule 19 provides that voters' list will be prepared constituency-wise by the District Electoral Officer following the provisions of the Act and the Rules and under the direction, control and supervision of the State Election Commission. Rule 20 empowers the District Electoral Officer to take assistance from Government employees and officers posted in the district in the preparation of the voters' list. Rule 21 provides that territorial constituency-wise voters' list of the Gram Panchayat shall be prepared u/s 137A of the Act, in Form 4 and the voters' list thus prepared will form the basis for preparing voters' list for the different constituencies. Rule 22 provides that the territorial constituency and the voters' list prepared for the constituency will be displayed for ten days at certain places specified in the rule. Rule 23 provides for amendment in the voters' list prepared under rule 21 and put on display under rule 22 either suo motu or on receipt of written objections within the specified time (ten days). Rule 24 provides for obtaining a copy of the voters' list on payment of certain fees and rule 25 provides for safe custody of the voters' list.

9. The State Election Commissioner informed the court that for the coming elections the draft rolls (voters' list prepared under rule 21) were published on 21.11.2000 and after expiry of the period for filing objection on 30.11.2000 the final rolls were published on 1.12.2000. On 3.2.2001 the Governor issued the notification u/s 136A of the Act fixing the election schedule and the issuance of the notification put the matter of any amendment or correction in the electoral

rolls beyond the powers of the State Election Commission as provided in the second proviso to Section 137A of the Act. The State Election Commission also informed the court that the first round of elections were to be held on 11.4.2001. According to the State Election Commissioner, the voters' lists for the coming elections were prepared following the provisions of the Act and the Rules. He sought to explain to the court the practical difficulties in meeting the requirement of additional ballot papers arising due to increase in the number of voters if the names of missing voters were to be incorporated at this stage. He also submitted that even with the best and most efficient electoral machinery, hundred per cent inclusion of voters may not be possible and omission here and there would always be inevitable.

10. To the court, however, it appears that the State Election Commissioner, is over-looking the degree of error that is coming to its notice in connection with the coming Panchayat elections.

11. It may be recalled here that the last Panchayat elections were held in this State in the year, 1978. Those elections were held under the Bihar Panchayat Raj Act, 1947. Thereafter fundamental and basic changes were made in the scheme of Gram Panchayats by the 73rd Constitutional amendment in 1993. Following the amendment of the Constitution, the Bihar Panchayat Raj Act, 1993 was enacted. Even thereafter no elections were held in this State apparently because a number of provisions of the 1993 Act, relating to reservation of seats etc., were held to be constitutionally invalid by this Court in the case of *Basudeo Besra Vs. Union of India (UOI) and Others* Against the decision of this court, the State went in appeal before the Supreme Court and used it as a pretext to appear to have forgotten all about holding the elections. It was only after this court wrote a scathing criticism of the State Government for not holding the Panchayat elections for the past, more than 22 years in the case of *Nand Kishore Singh (supra)*, that the State Government was moved into action and the coming elections were made possible.

12. The elections which are going to be held after more than 22 years seem to have evoked extra-ordinary enthusiasm in the people of the State. But the electoral officers, particularly those working in the field do not seem to be fully trained and equipped for managing and conducting the elections in a wholly satisfactory manner. Though the State Election Commissioner gave the dates of publication of the draft rolls and the final voters' list, in a number of writ petitions it is alleged that in fact no draft rolls were put on display in the respective Panchayat areas. In a few writ petitions receipts are produced showing submissions of objections to the draft rolls, and grievance is made that no action was taken on the objections. In some cases it is shown that in making the voters' list for the Panchayat election, one or more pages from the electoral roll for the legislative assembly were missed out with the result that the names of persons appearing on the missing pages were left out in the voters' list for the Panchayat. In one case it is stated that till the stage of the draft rolls the lists

were prepared correctly but in the final voters' lists the list for Ward No. 4 of the Gram Panchayat in question got duplicated for Ward No. 9 as well. The result was that the voters of Ward No. 4 were shown in two places, that is, in Wards Nos. 4 and 9 and the voters of Ward No. 9 were completely eliminated. As the error was made in the printing and publication of the final voters' lists, the aggrieved persons did not even get an opportunity to file objection, pointing out the mistake.

13. From the facts coming to the notice of this court it becomes evident that the errors made in the preparation of the voters' list are quite grave and serious and are likely to jeopardize the election process and eventually the election results.

14. Having seen briefly the nature of the errors made in the preparation of the voters' list it is now to be seen what may be the likely implications if the errors are left unheeded.

15. Rules 19 to 25 of the Election Rules, 1995, as noticed above, provide for the procedure for preparing the voters' list. The basis for preparation of the voters' list is provided in Section 137A of the Act. As the suffix "A" to the number of the Section suggests, the provision was not part of the Act as it was originally enacted but it was introduced by the Bihar Panchayat Raj (Amendment) Act, 1995 (Bihar Act 14, 1995). Even after its insertion, further additions were made in this provision later on. Section 137A, as it was first inserted, is as follows :

137A. Electors of Panchayat- All such persons who are enrolled as electors in the electoral rolls or that part of the rolls of the State Legislative Constituency for the time being in force which is concerned with the territorial constituency of any Gram Panchayat shall be the electors for concerned Panchayat elections.

16. Later, by Bihar Panchayat Raj (2nd Amendment) Act, 1995 (Bihar Act 5 of 1996), to the main body of Section 137A were added the following two provisions.

Provided that the State Election Commission suo motu or on receipt of written representation from an aggrieved person, is of the opinion that there is sufficient reason for doing so, may direct such changes to be made in the electoral rolls of the concerned territorial constituencies of the Panchayat, as he may deem proper :

Provided further that no such change of the electoral roll shall be made after the notification of the date of Panchayat election by the government u/s 137A of the Act.

17. Section 137A of the Act, thus, provides that all such persons who are enrolled as electors in the electoral rolls of the Legislative Assembly constituency shall be the electors for the concerned Panchayat elections.

18. Then rule 2 (da) of the Election Rules, 1955 (sic-1995?) defines voters' list to mean the voters' list prepared u/s 137A of the Act and rule 21 also provides for preparation of the voters' list u/s 137A of the Act.

19. Therefore, if it is shown that in the voters" list prepared for a territorial constituency of the Panchayat a substantial number of persons from the electoral rolls of the corresponding State Legislative Assembly constituency were left out, it has to be held that the preparation of the voters" list for the Panchayat was made in contravention of the Act and the Rules. This would directly attract section 144(1)(d) (iv) which contains one of the grounds for declaring the election to be void. Section 144(1)(d)(iv) is as follows :

144. Grounds for declaring election to be void.-(1) subject to the provisions of sub-section (2) if the prescribed authority is of opinion- (a) ----

(b) ----

(c) ----

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

(i) - - - -

(ii) ----

(iii) ----

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

20. Here it may also be borne in mind that the population of a Gram Panchayat area in terms of section 11 of the Act is to be, as nearly as possible, 7000. Assuming the extent of voting to be as high as 70%, the total votes cast should be around 5000 and in case there are five or six candidates in contest, the margin of victory would not be more than a few hundred votes. In such a situation if it could be shown that three to four hundred persons were left out from the voters" list prepared in violation of the provisions of the section 137A, read with rules 2(da) and 21 of the Rules, being set aside. Thus, if the error remains unheeded there is the possibility of a number of elections being declared void and thus every thing would be back to square one or very near to it after all the efforts made by the court, and the efforts and the expenses put in by the Government.

21. Thus, apart from the issue of denial of the right of the individual to participate in the election process, these case presented before this court the grave situation where a number of elections might have to be eventually set aside as a result of the errors committed in the preparation of the voters" list.

22. This was the problem that was presented before the court and this led to the next question as to how far it was constitutionally open to this court to give direction to take remedial measures, once the election process had been put into motion. On this issue Mr. Ram Balak Mahto appearing as amicus curae rendered

valuable assistance to the court. Mr. Mahto brought to the notice of the court the relevant provisions of the Bihar Panchayat Raj Act, 1993 including sections 140 and 143; section 140 provides that the election to any office of the Panchayat or a Gram Kutchary would not be called in question except by an election petition and section 143 puts a bar to interference by courts in electoral matters.

23. Apart from the provisions of the Act, Mr. Mahto pointed out that Article 243-0 (b) of the Constitution was verbatim the same as Article 239B of the Constitution, dealing with the elections to the State Legislatures. Mr. Mahto submitted that identical language used in Article 243-0 which was later inserted in the Constitution by its 73rd amendment simply meant that the decisions of the Supreme Court interpreting Article 329B would equally apply to electoral matters of Gram Panchayats. Then starting from N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others, Mr. Mahto cited before the court a number of decisions of the Supreme Court in which it was held that the word "election" used in Article 329B means and includes the entire process of election from the issue of the notification u/s 14 of the Representation of the People Act, 1951 to the declaration of the result u/s 66 of the Act. He finally brought to my notice a recent decision of the Supreme Court in Election Commission of India Through Secretary Vs. Ashok Kumar and Others, wherein a three Judge Bench of the Supreme Court, on a consideration of the earlier decision, including decisions by the constitutional Benches of the Supreme Court has discussed the delicate equation between the jurisdiction conferred on the High Court by Article 226 of the Constitution and the restrictions imposed by Article 329 and the question as to how far the two provisions could co-exist. On a consideration of the earlier decisions the conclusions were summed up in para 32 of the Judgment which is re-produced below :

32. For convenience sake we would now generally sum up our conclusions by partly restating what the two Constitution Benches have already said and then adding by clarifying what follows therefrom in view of the analysis made by us hereinabove :

(1) If an election, (the term election being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and which questioning may have the effect of interrupting, obstructing or protracting the election proceeding in any manner, the invoking of judicial remedy has to be postponed till after the completing of proceeding in elections.

(2) Any decision sought and..rendered will not amount to "calling in question an election" if it sub serves the progress of the election and facilitates the completion of election. Any thing done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.

(3) Subject to the above, the action taken on orders issued by Election Commission are open to judicial review on the well settled parameters which

enables judicial review on decisions of statutory bodies such as on a case of malafide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law

(4) Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the court has been sought for merely to correct or smoothen the progress of the election proceeding to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time of the results are declared and stage is set for invoking the jurisdiction of the court.

(5) The court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(b) but brought to it during the pendency of election proceedings. The Court must guard against any attempt at retarding, interrupting, proceedings. Care has to be taken to see that there is no attempt to utilize the court's indulgence by filing a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the court would act with reluctance and shall not act, except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same by necessary material.

(emphasis added)

24. Mr. Y. C. Verma, Advocate also brought to my notice another decision of the Supreme Court in *Surinder Kaur Vs. State of Punjab and others*, In that decision, setting aside the election of one of the respondents to the office of Sarpanch, the Supreme Court directed the respondent authorities to conduct the election afresh according to rules.

25. On the basis of the Supreme Court decision in the Election Commission of India (supra), specially what is stated in sub-paras (2) and (4) of para 32 of the decision, I feel satisfied and convinced that not only there is scope for this court to issue appropriate directions to correct the grave errors in the election process but in the facts and circumstances as narrated above an occasion has arisen to issue necessary directions.

26. This court accordingly proceeds to do so.

27. It is directed that in case it is brought to the notice of the District Electoral Officers by March 18, 2001 (and not later than that date), that hundred or more electors whose names appear in the electoral rolls for the last election to the State Legislative Assembly constituency are missing from the voters' lists prepared and finalized for the coming Panchayat elections, the concerned District Electoral Officer will take immediate steps for publication of supplementary voters' list for the Panchayat election, incorporating all the missing names of electors. The concerned District Electoral Officer will also simultaneously take steps, under intimation to the State Election Commission and the Secretary,

Department of Panchayat Raj, Government of Bihar to provide for additional ballot papers on the polling booths where the number of voters would increase as a consequence of the publication of the supplementary voters" list. The supplementary voters" list should be prepared as early as possible and preferably by March 21, 2001. The additional ballots will be made available on the polling booths on the date already fixed for election in that territorial constituency and the whole exercise must be completed before the date fixed for polling in that constituency and on no account should the election schedule be disturbed. For carrying out the directions given by this court effectively and faithfully, the State Election Commission and all concerned departments of the State Government shall render full help and assistance to the concerned District Electoral Officers.

28. The District Electoral Officers will not entertain any complaint regarding missing names in the voters" list after March 18, (Sunday), 2001 and they will not entertain any complaint if the number of missing names is less than hundred.

29. These directions are being Issued by this court to "subserve the progress of the election and facilitate the completion of the election" and "to correct or smoothen the progress of the election proceeding". The object of this court is not to enforce any individual rights and, therefore, the individuals whose names may not ultimately find a place in the voters" list for the Panchayat elections may take recourse to such remedies and reliefs as may be available to them in law. As the aforesaid directions are not intended to enforce any individual's rights, the supplementary voters" list prepared in furtherance of these directions will be used only for casting votes by those electors whose names were earlier left out in the voters" list and whose names got incorporated in the supplementary list. The supplementary voters" list will not be used for filing nominations or for restoration or revival of a nomination paper earlier rejected on the ground that the candidate"s name was missing in the voters" list. This is for the reason that allowing fresh nomination or revival or a nomination earlier rejected on the basis of the supplementary voters" list would involve not only printing of additional ballot papers but de novo printing of fresh ballot papers after including the name of an additional candidate. This I feel may not be practically possible in the short time left for holding the election and may lead to postponement of the election which is not acceptable to this court at any cost. Hence, the aspiring candidates who were unable to contest the election due to any alleged error in the voters" list are left to seek their remedy/relief under the provisions of the Act and the Rules.

30. In the light of the discussions made above, CWJC Nos. 2326, 2376, 2399, 2403, 2406 and 2485 of 2001 are dismissed as they primarily relate to enforcement of individual rights with the petitioners seeking a direction for their nomination to be accepted, or they relate to omission of a very small number of individuals from the voters" list. For the reasons discussed above, no relief can be granted to the petitioners in those petitions by this writ court and they may

seek their remedies/reliefs under the provisions of the Act.

31. CWJC Nos. 2276, 2280 and 2345 of 2001 are allowed and the concerned District Electoral Officers are directed to prepare supplementary voters' list Incorporating the names of the missing electors in the light of the directions given above.

32. CWJC Nos. 2242, 2305 and 2517 of 2001 are dismissed in so far as a prayer is made for direction for acceptance of the petitioners' nominations but are allowed to the extent that prayer is made for inclusion of a large number of missing electors in the voters' list. The concerned District Electoral Officer is directed to prepare supplementary voters' list in the light of the directions made above.

33. Before parting with the records of these cases, I wish to put on record due acknowledgement of the assistance received from the bar; special appreciation is due to Mr. Ram Balak Mahto who gave valuable assistance as amicus curae. Let copies of this order be handed over to Mr. AAG III and Mr. Kumar Brajendra Nath, counsel for the State Election Commission for immediate onward communication to the Government and the Commission who in turn will ensure that relevant portions of the judgment/instructions based thereon are sent forthwith to all District Electoral Officers for compliance with the directions of this court.