

(2008) 08 PAT CK 0073
In the Patna High Court

State Election Commission and Others	APPELLANT
Vs	
Punam Kumari and Another	RESPONDENT

Date of Decision : 22-08-2008

Acts Referred:

Citation : (2008) 08 PAT CK 0073

Final Decision : Allowed

Judgement

1. In a writ petition the respondent-petitioner complained before this Court that the seat of Makhiya of a particular Panchayat was reserved for extremely backward class community, and the same is being occupied by a person, who does not belong to the said community, and the Election Commission failed to even address itself to a complaint made by the petitioner to the effect. By the judgment and Order under appeal the writ petition was allowed with a direction upon the Commission to decide the merits of the said 66mplaint. While the appeal was preferred; by" the Commission against the judgment and order under appeal, the Commission applied its mind to the complaint lodged by the petitioner-respondent and concluded, ultimately, that the person elected does not belong to the Community for which the post in question was reserved. On such conclusion, Commission declared the election invalid. Subsequent thereto, the person, whose election was, thus, declared invalid, preferred a separate appeal against the judgment and order under appeal. These two appeals were heard together and are being disposed of by this common judgment and order.

2. The one and the only question raised in the present appeals is whether the Commission had competence to decide the complaint of the petitioner-respondent and if not what is the effect of the decision rendered by the Commission in compliance with the directions issued by the judgment and order under appeal.

3. Article 191 of the Constitution of India provides what are the "disqualifications for membership of Legislative Assembly or Legislative Council of a State. The said Article, amongst others, provides that one of those disqualifications would

be as may be prescribed by and under any law made by the Parliament. Therefore, in addition to specific disqualifications mentioned in the said Article, any other disqualification prescribed by any law made by the Parliament would also be a disqualification for being a member of Legislative Assembly or Legislative Council of a State. At the same time, Article 193 provides, amongst others, that if a disqualified person, knowing that he is disqualified, sits or votes as a member of Legislative Assembly or Legislative Council of a State, he shall be liable to be penalized to the extent as mentioned in the said Article. However, neither the said Articles, nor any other provision contained in the Constitution prescribed who shall adjudicate such disqualification, if any. At the same time, however, Article 329(b) makes it abundantly clear that notwithstanding anything in the Constitution no election to either House of Parliament "or either House of the Legislature of the State shall be called in question except by election petition presented to such Authority and in such manner as has been provided for by and under any law made by to Legislature. There is no dispute that bylaw made by the Parliament many other disqualifications have been added to the disqualifications mentioned in Article 191 of the Constitution. While exercising power of selecting an Authority and providing manner for resolving election disputes, there is no dispute that the High Court has been constituted as the election tribunal, which, at the same time, has been authorized to go into the question of disqualifications. Despite that matters pertaining to disqualification have been frequenting Courts under Article 226 and not through the Election Petitions. After consideration of many earlier judgments of the Hon''ble Supreme Court, the Hon''ble Supreme Court in the case of K. Venkatachalam Vs. A Swamickan and Another, at paragraph 27 of the reported judgment, upheld the jurisdiction under Article 226 of the Constitution pertaining to disqualification of a member of a Legislative Assembly while observing as follows:

Article 226 of the Constitution is couched in the widest possible terms and unless there is a clear bar to jurisdiction of the High Court its power under Article 226 of the Constitution can be exercised when there is any act which is against any provision of law or violative of Constitutional provisions and when recourse cannot be had to the provisions of the Act for the appropriate relief. In circumstances like the present one the bar of Article 329(b) will not come into play when the case falls under Articles 191 and 193 and the whole of the election process is over.

Principally relying upon this judgment many inferences have been made by this Court under Article 226 in Panchayat elections when questions raised before this, Court were either eligibility or disqualification of a person elected in a Panchayat. In this connection, our attention has been drawn to a judgment rendered by a Division Bench of this Court in CWJC No. 10139 of 2002 (Lachcho Devi v. State of Bihar) rendered on 10th October, 2005 and a judgment of a learned single Judge rendered in the case of Shailendra Pratap Singh and Another Vs. State of Bihar and Others The Division Bench judgment, referred to above, went into the facts, but did not consider whether the High Court under Article 226 of the Constitution

could at all exercise the power as was exercised by the Division Bench. The learned single Judge in the judgment, referred to above, felt that in view of the above pronouncement of the Hon''ble Supreme Court, the High Court was competent to go into the question and to decide the issue. None of these judgments referred to the constitutional provisions pertaining to Panchayats.

4. Chapter IX of the Constitution deals with Panchayats. Article 243 to Article 243(0) are contained in Chapter IX of the Constitution. Article 243-D mandates reservation in favour of Schedule Caste and Schedule Tribe Communities and at the same time grants discretion to the State Legislature for making reservation in favour of backward class citizens. The Articles contained in Chapter IX of the Constitution do not say what would happen to the election where a person has been elected who does not belong to the category for which the reservation has been made. No other provision contained in the Constitution also throws any light in relation thereto. However, when the mandate is to reserve or when discretion has been granted for making reservation, it must be deemed that the reserved seats must be occupied by persons for whose benefit such reservations have been made. This, to us, has been amplified in Sub-article (1) of Article 243(f), where disqualification has been considered. It has been provided in the said sub-article that a person shall also be disqualified for being chosen as a member of the Panchayat if he is so disqualified by and under any law made by the Legislature of the State. There is no dispute that the State Legislature has provided in Section 135 of the Bihar Panchayat Raj Act, 2006 that a person, who does not belong to a reserved category, shall not be qualified to be elected to a seat which is reserved for such category. In that view of the matter, if the person does not belong to the reserved category but is occupying a reserved seat, though through election, the dispute in relation thereto would not be an election dispute, but would, be a qualification dispute unrelated with election. Such a dispute, being not an election dispute, is not covered by Article 243(0) of the Constitution. It has been held by a constitutional Bench of the Hon''ble Supreme Court in the case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, , that the immunity-of Article 329(b) is conferred only if the act is done for the apparent object of furthering a free and fair election and the protective armour drops down if the act challenged is either unrelated to or thwarts or taints the course of election. Therefore, in the event such a matter is highlighted before the Court exercising jurisdiction under Article 226 of the Constitution, unless there is a bar, the Court under Article 226 of the Constitution can certainly go into the question as has been squarely held by the Hon''ble Supreme Court in the case of K. Venkatachalam (supra).

6. While specifying disqualifications in Article 191, the Constitution did not mandate the method of sorting out disputes pertaining thereto. Creation of a Forum by the Representation of People Act, 1951 did not bar the jurisdiction under Article 226 of the Constitution, since a law made by Legislatures cannot affect the Constitution. However, while prescribing disqualifications for membership of a member of Panchayat by Article 243(f) the Constitution

mandated that questions relating to disqualification shall be referred for the decision of such Authority and in such manner as the Legislature of the State may by law provide.

6. There is no dispute that while one of the disqualifications prescribed in Section 135 of the Act made by the Legislature is election of a person to a reserved post, when he does not belong to the community for whom the reservation has been made, the legislation in Section 136 of the Act has laid down other disqualifications and at the same time directed that the disqualifications laid down in Section 136 of the Acts should be decided by the Commission by providing the same in Sub-section (2) of Section 136, but specifically mandated that the disqualification mentioned in Section 135 of the Act shall be decided by the Election Tribunal provided that such disqualification the returned candidate had on the date of his election by providing the same in Clause (a) of Sub-section (1) of Section 139 of the Act.

7. When the Constitution has empowered the State Legislature, to provide for a mode and method of deciding a particular dispute, the mandate of the Constitution should be construed as a direction to have a decision in such manner, and method and not through the plenary power of the writ Court vested in it by Article 226 of the Constitution. The plenary power can be used to question the decision rendered by the Authority prescribed by the State but the writ Court cannot assume to itself such a power.

8. The disqualifications mentioned in Section 136 are specific and do not cover the disqualification mentioned in Section 135. If a Forum does not possess the power to decide a disqualification it cannot be directed to decide the same. In the instant case, the State Legislature has decided that disqualification matters should be decided by two Forums. As regards a type of disqualification a Forum has been selected and for other types of disqualifications another. Such Forums being available and the same having been established on the basis of a Constitutional mandate the judgment of the Hon'ble Supreme Court in K. Venkatachalam (supra) has no application as there is provisions for taking recourse for appropriate relief and, accordingly, it must be construed that the Court under Article 226 of the Constitution would not at the threshold go into that question.

9. That being the situation, it appears to us that if disqualification as on the date of election based on the allegation that the person seeking election or having been elected was not a member of the community for whom the reservation was made, is the dispute, the same can only be sorted out by an election petition to be presented before the Election Tribunal and not by presenting a writ petition.

10. As noted above, on the basis of the judgment and order under appeal the matter has been gone in by the Commission and the Commission has rendered a decision. The question is whether the decision is valid or not. For what we have discussed above it appears to us that the disqualification mentioned in Section

135 of the Act cannot be gone in by the Commission. The Commission being a creature of the Statute can function and discharge its duties within the four corners of the Statute and cannot assume or be vested with any power which has not been vested in it by the Statute. If the Commission had no authority to go into the question, as was decided by it, such authority could not be vested in it by exercising power under Article 226 of the Constitution of India, for the simple reason that the Article 226 authorizes the Court to uphold legal right of a citizen which right stands vested in the citizen and that signifies that the writ Court cannot vest" any right in a citizen which does not vest in him. That being the situation, the conclusion would be that the decision of Election Commission rendered on the basis of the command of the writ Court being a decision rendered by a Forum non-juris, the same is invalid.

11. Accordingly, we allow the appeals, set aside the judgment and order under appeal, dismiss the writ petition and at the same time set aside the order of the Commission rendered on the basis of the judgment and order under appeal. There shall be no order as to costs.

12. We think, it would be appropriate on our part to record, at this stage, that the learned Counsel for the appellant in LPA No. 548 of 2008 wanted to cite an unreported judgment before us but inasmuch as we had started rendering the judgment, we could not look into the same.

13. Having regard to the questions raised in these appeals, as narrated above, we have condoned the delay in preferring the appeal registered as LPA No. 584 of 2008.