
(2009) 01 PAT CK 0112
In the Patna High Court
Case No : CWJC No. 12944 of 2008

Sunil Kumar Tiwary and Another

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 15-01-2009

Acts Referred:

Constitution of India, 1950 — Article 163, 163(1), 163(2), 166(3), 18(3)

Citation : (2009) 1 PLJR 516

Hon'ble Judges : Chandramauli Kr. Pd., Acting C.J.; Ravi Ranjan, J

Bench : Division Bench

Advocate : Ashutosh Ranjan Pandey, Jay Shankar Pathak, Rakesh Narayan Singh, Ramanuj Tiwary and Anil Kesri, for the Appellant; P.K. Shahi and Girijesh Kumar for the state, Mr. A. Amanullah for Respondent Nos. 1, 2 and 5, Mr. Sudhir Singh for Respondent Nos. 3 and 4, M/s R.S. Pradhan and Rajiv Lochan for Respondent 8 and Mr. S.K. Ghosh for Respondent 9, for the Respondent

Final Decision : Allowed

Judgement

C.K. Prasad, A.C.J.

1. Petitioner No. 1 claims to be a Social Worker and Secretary of petitioner No. 2, Servers of Society, an organization purportedly working in the interest of society at large and its members are social workers, lawyers, doctors, engineers etc and in this writ application, their prayer is for issuance of a writ in the nature of quo-warranto for removal of Respondent No. 8 J.K. Dutta as the State Election Commissioner. Facts lie in a narrow compass.

2. Respondent No. 8 J.K. Dutta is an officer of 1970 Batch of Indian Administrative Service and his appointment as the State Election Commissioner has been made by the order of the Chief Minister. His appointment did not have the approval of either the Council of Ministers or the Governor of the State. It is further an admitted position that post facto approval of the appointment of Respondent No. 8 has not been obtained either from the Council of Ministers or the Governor. It is not the case of the petitioners that Respondent No. 8 suffers

from any disqualification to occupy the office of the State Election Commissioner but their stand is that the appointment of the State Election Commissioner is required to be made by the Governor of the State and Respondent No. 8 undisputedly having not been appointed by him, his appointment is illegal.

3. Mr. R.S. Pradhan, Senior Advocate, appearing on behalf of Respondent No. 8 has questioned the locus of the petitioners to challenge his appointment. It has been pointed out that petitioner No. 1, according to his own showing, is a Social Worker and Secretary of an unregistered organization and hence has no locus to question the validity of his appointment. It has vaguely been suggested that the writ application filed by the petitioner is politically motivated at the instance of certain politicians, who could not get due favour from him. According to him, the writ application is politically motivated and can very well be termed as political interest litigation and deserves to be thrown out on this ground alone. However, no specific details has been given as to who are the politicians and at whose instance the application has been filed and how it can be said to be politically motivated.

4. In my opinion, an application challenging the validity of an appointment to a public office shall be maintainable at the instance of any person, notwithstanding the fact that none of his fundamental or other legal right has been infringed, if the Court comes to the conclusion that in the interest of public the legal position with respect to usurpation of a public office deserves to be judicially declared nothing shall prevent this Court to issue a writ in the nature of quo-warranto at the instance of any member of the public, unless it is shown that the petition lacks bona fide and the person questioning the appointment is a mere pawn in the game, having been set up by other. Petitioners in this proceeding are not seeking to enforce any of their right as such nor complaining nonperformance of any duty to them, but this will not decide the issue. In a writ of quo-warranto the question is of the right of the person to hold the office. Tested in the light of the aforesaid legal position, it is difficult to hold that the petitioner has acted mala fide and he has been set up by other. Accordingly, I overrule this objection.

5. Mr. Ashutosh Ranjan Pandey, learned Counsel appearing on behalf of the petitioners, submits that power to appoint the State Election Commissioner vests in the Governor and in this connection, he has drawn our attention to Article 243K of the Constitution of India and Section 123 of the Bihar Panchayat Raj Act, 2006.

6. Mr. Advocate General, appearing on behalf of the State, however, contends that appointment to the office of the State Election Commissioner is not within the individual discretion of the Governor and according to him, this business has been allocated to the Chief Minister under the Rules of Executive Business made under Article 166(3) of the Constitution of India. In this connection, he has drawn our attention to Rule 32(a)(ix) of the Rules of the Executive Business, 1979 hereinafter referred to as the Rules. According to him, the State Election Commissioner is the Head of the Department and hence, the Chief Minister is

competent to take decision for appointment to the said office. It has been pointed out that the office of the State Election Commissioner does not figure in the III Schedule of the Rules, so as to require its consideration by the Council of Ministers for making appointment.

7. Rival submissions necessitate examination of the Constitution as also the provisions of the Bihar Panchayat Raj Act, 2006, hereinafter referred to as the Act. Section 243K of the Constitution of India vests in the State Election Commission the power of superintendence, direction and control of the preparation of electoral rolls for and conduct of all elections to the Panchayat. It also provides that State Election Commission shall consist of a State Election Commissioner to be appointed by the Governor. The Legislature, in conformity with the Constitutional provision, had provided for the State Election Commissioner for superintendence, direction and control of the preparation of electoral rolls for conduct of all elections to the Panchayat bodies u/s 123 of the Act. It has further provided that the Commission shall consist of a State Election Commissioner to be appointed by the Governor. Section 123 of the Act, which is relevant for the purpose, reads as follows:-

"123. State Election Commissioner.-(1) There shall be a State Election Commission for superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all election to the Panchayat bodies in the State under this Act and the rules made thereunder. The Commission shall consist of a State Election Commissioner to be appointed by the Governor.

(2) The conditions of service and tenure of office of the State Election Commissioner shall be such as the Governor may by rule determine:

Provided that the State Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the High Court and the conditions of service of the State Election Commissioner shall not be varied to his disadvantage after his appointment.

(3) The Government shall, when so requested by the State Election Commission, make available to the State Election Commission such officers and staff as may be necessary for the discharge of the functions conferred on the State Election Commission under this Act."

8. From a plain reading of Article 243K of the Constitution of India and Section 123 of the Act, it is evident that State Election Commission shall consist of a State Election Commissioner to be appointed by the Governor. Article 163(1) of the Constitution contemplates a Council of Ministers with the Chief Minister as the head to aid and advise the Governor in exercise of his functions, except in so far as he is by or under this Constitution require to exercise his functions or any of them in his discretion.

9. Although a half hearted attempt was made by the petitioner to contend that appointment of the State Election Commissioner is within the individual

discretion of the Governor, but nothing has been pointed out to show that such appointment is within his individual discretion. Article 163 of the Constitution, which is relevant for the purpose, reads as follows:-

"163. Council of Ministers to aid and advise Governor.-(1) There shall be a Council of Ministers with the Chief Minister as the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion,

(2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision for the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion,

(3) The question whether any, and if for what, advice was tendered by Ministers to the Governor shall not be inquired into in any court."

10. Article 163(1) makes it clear that the Governor in exercise of his functions acts on the aid and advice of the Council of Ministers, but there can be cases where the Governor is by or under the Constitution, required to exercise his functions in his discretion. Article 239(2), Article 371-A (1)(b), Article 371A(2) (b) , Article 371-A (2)(f) and paras 9(2) and 18(3) of the Sixth Schedule are some of the provisions, where the Governor is to act in his discretion. Undoubtedly, the aforesaid Articles and paras of Sixth Schedule do not embrace the appointment of the State Election Commissioner within the discretion of the Governor and, therefore, the question, which falls for consideration at the first instance is as to whether the Governor can act in his discretion only with regard to the acts expressly enumerated in the Constitution. Article 163(2) of the Constitution expressly provides for a decision by the Governor as to whether any matter is or is not within his discretion. In my opinion, merely because the Constitution of India expressly provides, in some cases, for the Governor to act in his discretion, it cannot be inferred that the Governor can so act only where the Constitution expressly so provides. If it is held so, then Article 163(2) of the Constitution would be redundant. A question whether a matter is or not a matter in which the Governor is required to act in his own discretion cannot be confined to the matters enumerated in the Constitution. In view of Article 163(2) of the Constitution, in my opinion, it may include such matters where the Governor can act in his discretion, though the Constitution has not expressly so provided.

11. The next question, which requires consideration, is as to whether in appointment of the State Election Commissioner, the Governor is required to act in his discretion, even though the Constitution has not expressly so provided. It is well settled rule that the Governor acts on aid and advice of Council of Ministers and not independently or contrary to it. The case of appointment of the State Election Commissioner does not come within any of the exceptions under

which the Governor is required to act in his own discretion. Such being the position, the appointment of Respondent No. 8 J.K. Dutta as State Election Commissioner cannot be faulted only on the ground that he was not appointed by the Governor personally.

12. Mr. Pandey, then submits that the Chief Minister is not competent to appoint a State Election Commissioner under the Rules. He points out that the Governor had made the rules for convenient transaction of the business of the Government and the business of appointment of a State Election Commissioner has not been vested in the Chief Minister. In the absence thereof, according to him, it was the Council of Ministers, who can make appointment.

13. Mr. Advocate General, however, points out that Rule 32(a)(ix) of the Rules provides for submission of the cases for appointment of the heads of departments to the Chief Minister and this business having been allocated to the Chief Minister, Respondent No. 8 has been appointed in accordance with the Rules. According to him, the State Election Commissioner is the head of department. Rule 32(a)(ix) of the Rules, reads as follows:-

"32 (a) The following cases shall be submitted to the Chief Minister through the Chief Secretary by the Principal Secretary/Secretary of the department concerned after consideration by the Minister-in-charge but before the issue of orders:

X X X X

(ix) Proposals for appointment of Heads of Departments, or promotion to the posts of Heads of Departments.

(i) Proposals regarding super-time and senior scale officers of the Indian Administrative Service and the Indian Police Service and officers of these services drawing higher scale of pay;

(ii) Proposals regarding departmental Secretaries, Special Secretaries, Additional Secretaries, other than those mentioned in sub-rule (ix)(i) above, Heads of Departments and other officers, whose maximum pay in the pay scale of Rs. 5,000/ and above alongwith the recommendations of the Establishment Committee constituted in accordance with Cabinet Secretariat's resolution No. 3918, dated the 25th October, 1980."

14. Schedule 1 of the Rules contains the list of Department. In my opinion, the expression "Heads of department" in the context would mean the heads of department as given in the First Schedule of the Rules. Rule 5 of the Rules contemplates that the business of the Government shall be transacted in the departments specified in First Schedule. The State Election Commission has not been shown and could not be shown as the department of the Government and hence, under the Rules of Executive Business, the Chief Minister does not possesses the power for appointment of the State Election Commissioner.

15. It has alternatively been contended by the learned Advocate General that all cases referred to in the Third Schedule of the Rules is required to be brought before the Council of Ministers in accordance with the procedure contained in part-2 of the Rules and Third Schedule does not contain appointment to the office of the State Election Commissioner. Accordingly, it is contended that it is not necessary to bring the matter of appointment of State Election Commissioner before the Council of Ministers. Rule 10 of the Rules reads as follows:-

"10. Subject to the orders of the Chief Minister under Rule 15, all cases referred to in the Third Schedule to these rules shall be brought before the Council in accordance with the provisions of the rules contained in Part II:

Provided that no case in regard to which Finance Department is required to be consulted under Rule 12 shall save in exceptional circumstances under the direction of the Chief Minister be discussed by the Council unless the Finance Minister has had opportunity for its consideration."

16. True it is that the Third Schedule of the Rules do not contain the appointment of the State Election Commissioner, but from that, it cannot be inferred that the power of appointment vests alone with the Chief Minister. According to the Rules, certain business of the Government require to be transacted by the Ministers-in-charge of the department and certain business required to be considered by the Minister and the Chief Minister, but not the entire Council of Ministers. The business of appointment has neither been allocated to any Minister or the Minister-in-charge and the Chief Minister or the Chief Minister alone and in that view of the matter, there is no escape from the conclusion that Respondent No. 8 has been appointed as the State Election Commissioner not in accordance with law. This itself renders his appointment vitiated in the eye of law.

17. Mr. Advocate General, then contends that even if the appointment of Respondent No. 8 is held to be illegal, he can be removed only in accordance with the procedure prescribed under Rule 6 of the State Election Commissioner (Appointment and Conditions of Services) Rules, 2008 and proviso to Section 123(2) of the Act, quoted above. Rule 6 of the aforesaid Rules reads as follows:-

"6. Removal.-The State Election Commissioner shall be removed from his office in the like manner and on the similar grounds that of removal of the Judge of a High Court."

18. Mr. Advocate General, further points out that the term of office of the State Election Commissioner is of five years from the date he assumes the office or till the age of 65 years, whichever is later and as such, appointment of Respondent No. 8 is protected for the aforesaid period under the aforesaid Rule. According to him, before the expiry of the aforesaid period, he can be removed in the like manner and on the similar grounds as that of the Judge of the High Court.

19. I do not find any substance in his submission. Rules 5 and 6 of the State Election Commissioner (Appointment and Conditions of Services) Rules, 2008 or

proviso to Section 123(2) of the Act shall protect only such State Election Commissioner, who has been appointed in accordance with law. In case it is found that the appointment itself is not in accordance with law, it is required to be declared so and though for practical purpose, it may amount to removal of the State Election Commissioner, but the removal of a State Election Commissioner by issuance of a writ in the nature of quowarranto, would not come within the purview of removal as contemplated under Rule 6 of the Rules or proviso to Section 123(2) of the Act aforesaid. A person not appointed in accordance with law is the usurper of the office and he is required to vacate such office by issue of writ in the nature of quo-warranto. As I have found that appointment of Respondent No. 8 to the office of the State Election Commissioner is not in accordance with law, he is the usurper of that office and for his removal, procedure as prescribed under Rule 6 of the Rules or for that matter Section 123(2) of the Act is not required to be followed.

20. Accordingly, I restrain Respondent No. 8 J.K. Dutta from discharging any of the functions, rights or duty of the office of the State Election Commissioner. As Respondent No. 8 individually does not suffer from any disqualification and his appointment suffers from the vice of procedural ultra vires, I direct that no refund of salary or other emoluments be made and further all the acts done by him, shall not be held illegal only on the ground that his appointment has been found to be not in accordance with law.

21. In the result, writ application is allowed. Let a writ in the nature of quowarranto issue accordingly. There shall be no order as to cost.

Dr. Ravi Ranjan, J.

22. I agree.