

(2009) 09 PAT CK 0025

In the Patna High Court

Case No : Letters Patent Appeal No. 510 of 2008

Vijay Kumar Chaudhary

APPELLANT

Vs

The State Election Commissioner, The State of Bihar and
Bhola Sah

RESPONDENT

Date of Decision : 15-09-2009

Acts Referred:

Citation : (2009) 09 PAT CK 0025

Final Decision : Dismissed

Judgement

Shiva Kirti Singh, J.

The appellant was declared elected to the post of Mukhia of Mahinathpur Gram Panchayat in the district of Madhubani (Bihar) in the last election. Soon thereafter a complaint case bearing No. 2 of 2007 was filed before the State Election Commissioner, Bihar. That case was heard on several dates, the State Election Commissioner allowed the parties to produce evidence and also got the matter enquired by the District Magistrate, Madhubani who submitted a report to the State Election Commissioner against the appellant that he had acquired Nepali Citizenship when he attained the age of 17 years and his father and one of his brothers were also citizens of Nepal. Considering all the evidence and materials, the State Election Commissioner by order dated 25-5-2007, passed in exercise of power u/s 136(i)(a) of the Bihar Panchayat Raj Act (hereinafter referred to as the "Act") disqualified the writ petitioner/appellant from holding the post of Mukhia. The said post was ordered to be treated as vacant and during the pendency of the writ petition respondent No. 4 has been elected to that post. The writ petition was dismissed by the order under appeal dated 11-4-2008.

2. The main issue is whether the order dated 25-5-2007 passed by the State Election Commissioner is a legal and valid order or not.

3. The case of the appellant/writ petitioner is that he is Citizen of India because his ancestors including his grand-father were Citizens of India. He has claimed

that his fore-fathers were resident of a village in the district of Muzaffarpur (Bihar) and his ancestors had settled at his present village in district of Madhubani. The appellant has placed reliance upon the fact that on attaining majority his name figured in the voter list of the village, Mahinathpur, district - Madhubani for which he was issued voter identity card and he has also received education in India. It is also the case of the appellant that documents, if any, showing that he was granted Citizenship of Nepal on his application, are forged and fabricated documents.

4. The order passed by the State Election Commissioner under issue as well as the judgment under appeal proceed on the basis of certain facts emerging from evidence including inquiry report by the District Magistrate. The officials verified the facts by visiting the concerned district authorities of Dhanusa situated in Nepal and it has emerged as a fact that the appellant acquired Nepali Citizenship in Bikram Samvat 2034-7-14 at the age of 17 years by filing application and his Citizenship number is available on record. It is also a verified fact that father of the appellant Yogendra Prasad Chaudhary is a voter of Janakpur town in Nepal. His address and voter number have also been mentioned in the order passed by the State Election Commissioner. These facts appear to have been verified and have also been certified by the concerned district authorities of Dhanusa (Nepal).

5. The Writ Court has examined the provisions of the Nepalese Citizenship Act 1964 and has quoted Section 9 thereof which provides that the Citizenship of any Nepali citizen shall automatically lapse on his acquiring citizenship of any foreign country of his own will. It further provides that in case any person becomes a citizen of a foreign country as well as of Nepal at the same time, he may loose the citizenship of either country within five years of reaching 16 years of age. In case he does not do so, his Nepali Citizenship shall automatically lapse on the expiry of this time limit. The writ court has held that on the basis of evidence available on record it is clear that the appellant opted for Citizenship of Nepal at the age of 17 years as per certificate of Nepali officials issued during enquiry in the present case. The Citizenship certificate issued in relation to the appellant was found genuine on comparison with the entry in the concerned Ledger.

6. Learned Counsel for the appellant raised the same contentions as raised before the writ court that appellant should be held to be an Indian Citizen, as his name has been included as a voter in India and because he has studied in Educational institutions in India. It was also contended that after the appellant was declared elected, the election of the appellant could be challenged only through an election petition for which provisions have been made and that he cannot be un-seated by exercise of power by the Bihar Election Commission u/s 136 of the Act.

7. So far as the power of the State Election Commissioner is concerned, the provisions in Section 136 of the Act clearly provide for the same. Section 136 begins with a non-obstante clause and goes on to provide that a person shall be disqualified for election or after election, for holding the post as Mukhia etc., if

such person, inter alia, is not a Citizen of India. Sub-section (2) of Section 136 further provides that if any question arises as to whether a Member of a Panchayat at any level or Mukhiya of Gram Panchayat was before election or has become after election, subject to any of the disqualifications mentioned in Clause (1), the question shall be referred for the decision of the State Election Commissioner which has been given power also to take suo motu cognizance of such matters and decide such matters expeditiously after allowing sufficient opportunity to the affected parties of being heard. Such explicit statutory provision with a non-obstante clause clearly vests power in the State Election Commissioner and such power cannot be questioned on account of provision for election petition u/s 137 of the Act.

8. On behalf of respondents reliance was placed upon a judgment of the Supreme Court in the case of Hari Shankar Jain v. Sonia Gandhi (2001) 8 SCC 2333 in support of the proposition that disability on the ground of Citizenship, under the provisions of the Representations of the People Act 1951 has been held to be triable by the statutory authority, i.e., the Election Tribunal in view of nature of provisions of that Act. Reliance was also placed on another judgment of the Apex Court in the case of Sarbananda Sonowal Vs. Union of India (UOI) and Another, to highlight that burden of proof lies upon the person concerned who asserts to be a citizen of a particular country. In paragraph-26 of that judgment the Apex Court has observed that in order to establish one's citizenship, normally the person concerned may be required to give evidence of (i) his date of birth (ii) place of birth (iii) name of his parents (iv) their place of birth and citizenship. Some times the place of birth of his grandparents may also be relevant, such as u/s 6-A(1)(d) of the Citizenship Act. All the aforesaid facts would necessarily be within the personal knowledge of the person concerned and not of the authorities of the State. Therefore the burden is on the claimant of citizenship.

9. The Citizenship Act 1955 provides for acquisition of citizenship by birth if both his parents are citizens of India and the mother is not an illegal migrant at the time of his birth. For Citizenship by descent a person born out-side of India shall be a Citizen of India, if born after 1950, but before 10th December, 1992, as is the case at hand, if his father was a citizen of India at the time of his birth. There are some other provisions also for acquiring Indian Citizenship but those are not relevant because the appellant has not made out a case of Citizenship under special provisions such as by Registration or Naturalization etc. Section-9 of the Citizenship Act provides for termination of citizenship when any citizen of India, who by naturalization, registration or otherwise voluntarily acquires the citizenship of another country.

10. As held by the Apex Court, certain essential facts such as place of birth, date of birth, citizenship of the parents or at least of his father had to be within the special knowledge of the appellant. The facts pleaded by him and materials relied by him are not sufficient to show that he acquired citizenship of India by birth, or

by descent. On the other hand, the appellant's father has been found to be a citizen of Nepal and the appellant himself applied to become a citizen of Nepal by filing application at the age of 17 years.

11. On a careful consideration of rival submissions on the issue at hand and on consideration of facts discussed by the State Election Commissioner and by the writ court we find that once the complaint was filed before the State Election Commissioner leading to enquiry by the authorities of the State, the appellant had to show that he was a citizen of India. The burden of proof was upon him to give out the relevant facts and details which could show that he is a citizen of India either by birth or by descent as per his claim. Only on giving such detail and particulars, the correctness of those details could have been verified. As is apparent from the materials on records, the appellant failed to give out the required details which could show him to be a citizen of India. Further, on the basis of enquiry, the District Magistrate has also given several materials which show that in fact the appellant as well as his father are residents and citizens of Nepal. Even a certificate of Citizenship, as held by the Apex Court in the case of Hari Shankar Jain (*supra*) cannot be a conclusive evidence and it can be rebutted on the basis of evidence. Hence, the claim of the appellant that he should be declared citizen of India only on the basis of entry of his name in the voter list and issuance of voter identity card on that basis, cannot be sufficient and conclusive evidence for holding him as a citizen of India.

12. In our considered view the order passed by the State Election Commissioner and the judgment and order of the writ court under appeal do not suffer from any infirmity so as to warrant interference. We find no merit in this appeal. It is accordingly dismissed, but without costs.