

(1995) 01 PAT CK 0013

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 11126 of 1994

Vishwanath Sahani

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 31-01-1995

Acts Referred:

Citation : (1995) 01 PAT CK 0013

Final Decision : Dismissed

Judgement

A.K. Ganguly, J.—The subject matter of challenge in this case is the legality of the election held in respect of the Managing Committee of Manigachhi Prakhanda Matasyajivi Sahyog Samiti, Manigachhi (hereinafter referred to as the said Samiti).

2. It is common ground that the said Samiti is a Primary Co-operative Society. The order dated 24th October, 1994 (Annexure-5) passed by the Block Development Officer-cum-Election Officer, Manigachhi Block, Manigachhi, Darbhanga (Respondent No. 3) has been impugned in this writ petition. The allegation is that even though the said Officer was appointed as the Election Officer for the purpose of holding election of the said Samiti, he has delegated his authority in favour of Block Co-operative Extension Officer, Manigachhi Block, Manigachhi (Respondent No. 5), who has allegedly accepted, scrutinised and rejected the nomination papers. However, annexure-5 which is impugned in this writ petition does not show that. The said annexure shows that it has been done by Respondent No. 3 i.e. the Block Development Officer-cum-Election Officer, Manigachhi. However, from Annexure-8 it appears that as a result of the visit of the Chief Minister, the law and order situation had to be looked after by Respondent No. 3 and for that reason Respondent No. 5, the Block Co-operative Extension Officer, Manigachhi Block, was allowed to help the Respondent No. 3 in the acceptance of the nomination paper.

3. In view of the aforesaid position, as reflected from annexure-8, learned Counsel for the Petitioner states that the entire election process has become void

and should be set aside by this Court.

4. Learned Counsel for Respondent No. 6, the said Samiti, and Respondent No. 8, one of the private parties, who has been elected to the said Samiti appeared and raised a preliminary objection about the maintainability of the writ petition purporting to challenge the election of the Managing Committee of the said Samiti in this writ jurisdiction without exhausting the statutory remedy of filing election dispute under the Bihar Co-operative Societies Act, 1935 (hereinafter referred to as the said Act).

5. The matter was heard on the maintainability question without going into the facts of this case. It is also common ground that when the instant writ petition was filed on 15-12-1994 the election was already over and Respondent Nos. 7 to 14 were declared elected as the office bearers of the said Samiti by the Election Officer on 29-10-1994.

6. In view of the aforesaid factual position, it has been pointed out by the learned Counsel for the private parties that this writ petition has become infructuous and no relief can be granted. It was also pointed out that already an election dispute being Election Dispute Case No. 227 of 1994 has been filed u/s 48 of the said Act before the Registrar, Co-operative Societies, Bihar, Patna at the instance of one Ganesh Kumar Sahani challenging the said election. It has also been pointed out by the said Counsel that the averments in the instant writ petition and in the said election petition are almost identical and for the self same cause of action election dispute has been filed and is pending before the statutory authority and this writ petition has also been filed before this Court. In fact, a copy of the election petition has been handed over to the Court. That challenging the said election, an election dispute has been filed and is pending is not denied by the learned Counsel for the Petitioner at all.

7. In the background of this factual position, this Court is called upon to decide whether this writ petition is maintainable or not when there is a remedy available under the Act. relating to election dispute and especially when such a dispute has already been filed u/s 48 of the said Act at the instance of Anr. aggrieved person in respect of the very same election.

8. The main contention of the learned Counsel for the Petitioner is that the election being vitiated ab initial void, the bar of statutory remedy will not apply in this case and in order to substantiate the said claim he has relied upon the principle that here Respondent No. 3 himself being a delegated authority, he cannot further re-delegate his power to Anr. authority. In support of this contention, learned Counsel for the Petitioner has relied upon a decision of this Court in *Badrul Hassan v. State of Bihar* and Ors. reported in 1970 P.L.J.R. 224. The principles decided in the said case has no application in the present case inasmuch as in the said case it was decided that under the Bihar Panchayat Election Rules, 1959, the Sub-divisional Magistrate after delegating his power under Rule 34 to allot Symbol cannot alter the Symbol. In that case Respondent

No. 3 holding delegated power of election officer allotted Symbols to the candidates including the Petitioner and the allotment was published. Subsequently, the Symbol so allotted was sought to be interchanged by the order of Respondent No. 3 under the direction of the Sub-divisional Magistrate exercising the power of an Election Officer. On the basis of these facts the Court held that after the delegation of power to Respondent No. 3, the Sub-divisional Magistrate was completely divested of his function to act as an Election Officer and thereafter he cannot direct alteration of the allotment of Symbol. The aforesaid ratio of the said decision has no application in the present case.

9. On this point the learned Counsel for the Petitioner cited Anr. decision in the case of Mahesh Jha v. The State of Bihar and Anr. reported in 1983 B.B.C.J. 470. In that case it was decided that once the delegate exercises the power delegated to him, the delegate has no power to revoke the order passed by the delegate. The said principle is not even remotely attracted to the facts of the present case.

10. This Court is of the view that those questions relating to irregularity of an election can be raised and decided within the compass of an election dispute under the Act and assuming the allegation made by the writ Petitioner to be true and correct that does not make the election void ab initio. In this connection reference may be made to the decision of this Court in the case of Vijay Kumar Mishra and Brij Bihar Kuwar and Another Vs. State of Bihar and Others, . The relevant portions of paragraphs 9 and 10 of the said decision are set out below:

9. Validity of the election appears to have been made the sheet anchor of the action of the Government. In my view, this attitude is based on a complete misconception of law. An election can only be invalidated in an election petition filed u/s 48 of the Act. That having not been done, no authority even the Government can proceed on the assumption that an election is ipso facto void ab initio.

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10. I also hold that the election held on 15-11-1986 will be deemed to be a valid election since it has not been set aside in a properly constituted election petition u/s 48 of the Act.

11. I am in respectful agreement with the observation made by the Division Bench of this Court in Vijay Kumar Mishra (Supra) and hold that once, election is held, the same cannot be, save under extraordinary circumstances, set aside without resorting to the remedy prescribed under the said Act for setting aside the same.

12. In reply to the aforesaid proposition, learned Counsel for the Petitioner, cited a decision in the case of Ram Lochan Mahto and Ors. v. State of Bihar and Ors. reported in 1971 B.L.J.R. 98 wherein it has been said that once in a case the writ petition has been admitted and rule has been issued and if it is found in that case that the election has been held by violating the mandate of the law, then refusal

to give relief on the ground of alternative remedy is not permissible.

In that case the learned Judge came to this conclusion only where the writ petition has been admitted as would appear from the following observations made in paragraph 10 of the said decision:

While agreeing generally with what has been said by the learned Chief Justice, I would point out that the powers of the Court under Article 226 are wide enough in an appropriate case to interfere in an election matter and hold the election to be void although there was the alternative remedy available to the Petitioners under the Rules for challenging the election. I think that this principle should be and has got to be kept in mind at the time of issuance of rules in such cases. If it is found that the remedy of going to the Election Tribunal for challenging the election, although the challenge may be in respect of the whole election, is available to the Petitioner or Petitioners, the case should not be admitted and rule should not issued. But once if a case has been admitted and rule has been issued, then in a case like this where it is found that the election has been held by violating mandatory requirements of the law, to refuse to give relief to the Petitioners on the ground that the alternative remedy was available to them, to me it appears, will not be quite just and proper.

13. In this case, this Court is considering the question of alternative remedy at a pre-admission stage. Therefore, on the strength of the said authority cited by the Petitioner this Court, can refuse to entertain this writ petition at the pre-admission stage.

14. Learned Counsel for the Petitioner has also relied upon an un-reported judgment of this Court dated 18-11-1992 passed in C.W.J.C. No. 11329 of 1992 with C.W.J.C. No. 11589 of 1992. In that case the challenge was thrown to an order dated 5-11-1992 passed by the Deputy Development Commissioner, West Champaran by which he stayed the election process and the appointment of Special Officer in anticipation of the approval of the Registrar. In these facts of that case the learned Judges of the Division Bench held that the Deputy Development Commissioner, West Champaran himself being a complete stranger to the election process has appointed the Election Officer who conducted the election which was thus field to have been conducted without jurisdiction. Even in the case of such blatant usurpation of jurisdiction by the authority, the learned Judges of the Division Bench did not pass any final order but sent the matter to the Registrar to "issue an appropriate order in accordance with law in the light of the observations made in the judgment".

15. Normally the existence of an alternative remedy does not oust the jurisdiction of the writ Court but the writ Court while exercising its jurisdiction must act under self imposed restraint having regard to the existence of the alternative remedy, especially in the matters of election dispute. Since the right to seek election or the right to elect has always been considered to be a statutory right and the same is neither a common law right nor is either a

constitutional right or a fundamental right, the same must be exercised in accordance with the statutory prescription. Reference in this connection may be made to the decision of the Supreme Court in the case of S.T. Muthusami Vs. K. Natarajan and Others, a case in respect of Panchayat Election wherein the learned Judges of the Supreme Court after considering the relevant authorities on the subject, observed as follows in paragraphs 13 and 14 of the said decision at page 623.:

13. In the ultimate analysis, the Full Bench laid down:

12. There is no constitutional bar to the exercise of writ jurisdiction in respect of elections, to Local Bodies such as, Municipalities, Panchayats and the like. However, as it is desirable to resolve election disputes speedily through the machinery of election petitions, the Court in the exercise of its discretion should always decline to invoke its writ jurisdiction in an election dispute, if the alternative remedy of an election petition is available. So, their Lordships of the Supreme Court in Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, stated:

...though no legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the legislature to have-disputes about these special rights decided as speedily as may be. Therefore, writ petitions should not be lightly entertained in this class of cases.

14. We are inclined to accept this view which lays down a salutary principle.

16. In Anr. matter relating to election under Gujrat University Act, in the case of Gujarat University Vs. N.U. Rajguru and Others, , their Lordships of the Supreme Court have been pleased to observe as follows in paragraph 6 of the decision:

While considering an election dispute it must be kept in mind that the right to vote, contest or dispute election is neither a fundamental or common law right instead it is a statutory right regulated by the statutory provisions.

17. Reliance in this connection is also placed on the decision in K.K. Shrivastava and Others Vs. Bhupendra Kumar Jain and Others, , relevant portions whereof are set out below:

It is well settled law that while Article 226 of the Constitution confers a wide power on the High Court there are equally well settled limitations which this Court has repeatedly pointed out on the exercise of such power. One of them which is relevant for the present case is that where there is an appropriate or equally efficacious remedy the Court should keep its hands off. This is more particularly so where the dispute relates to an election.

18. It is also well settled that existence of exceptional or extra-ordinary circumstances will justify by-passing the alternative remedy, but in my opinion, no such extraordinary circumstances exist in the present case which need interference by this Court.

19. Therefore, this Court while passing this order has also taken note of the fact that an election dispute challenging the very same election is pending with identical allegations. In that view of the matter, it is open to the writ Petitioner, if he is so advised, to join the said proceeding in accordance with law. Here election was over by 29-10-1994 and the writ petition was filed on 15-12-1994 which is after the expiry of the period of limitation prescribed under Rule 21(x) of Bihar Co-operative Societies Rules. Therefore, in case the writ Petitioner chooses to file a separate election dispute, it is open to the authorities to consider the bar of limitation and proceed according to law.

20. With the above observation, this writ petition is dismissed at the stage of admission itself. There will be no order as to cost.