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Court : Patna

Decided On : Apr-06-2001

Judge : Nagendra Rai and S.K. Katriar, JJ.

Appeal No. : L.P.A. Nos. 257, 282, 283, 284, 288 and 289 of 2001

Appellant : The State Election Commissioner

Respondent : State of Bihar and ors.

Disposition : Appeal Allowed

Judgement :

Nagendra Rai, J.

1. All these appeals are directed against the order passed by a learned Single Judge in a batch of writ applications disposed of on 13-3-2001, directing the District Election Officers to prepare supplementary voters' lists if the matter is brought to their notice by 18-3-2001 that hundred or more electors whose names appear in the electoral rolls for the last election to the State Legislative Assembly are missing from the voters' lists prepared and finalised for the concerned Gram Panchayats for holding the impending Panchayat elections and further directing to provide for additional ballot papers on the polling booths on the date already fixed for election in that territorial constituency and the entire exercise to be done before the date fixed, for polling in a particular Gram Panchayat constituency. However, ft

has when further ordered that the supplementary voters' lists 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 as that will lead to the postponement of the election.

2. To take democracy to the grass-root level Parts IX and IX-A in the Constitution were introduced by the Constitution (Seventy-third Amendment) Act, 1992 and (Seventy-fourth Amendment) Act, 1992. Part IX deals with the constitution, composition and holding of regular election to the Gram Panchayat, and Part IX-A deals, with the Municipalities. The Bihar Government had enacted Bihar Panchayat Raj Act, 1947, dealing with the constitution, composition and holding of election to the Gram Panchayat. After introduction of Part-IX in the Constitution, the said Act was repealed and a fresh Act, being Bihar Panchayat Raj Act, 1993 (hereinafter referred to as 'the Act') was enacted in conformity with the aforesaid provisions, Section 121 of the said Act empowers the State Government to frame Rules and in exercise of that power, the State Government has framed Bihar Panchayat Election Rules, 1995 (hereinafter referred to 'the Rules').

3. Unfortunately, no election to the Panchayats in this State was held for about 22 years. The matter came to the notice of this Court in the case of Nand Kishore Singh v. Union of India, reported in 2000 (4) P.L.J.R. 819 and this Court noticed that the grass-root democracy is lacking in this State as no election has been held to the Gram Panchayats and other local bodies for a long period. The State Government in the said case filed an affidavit agreeing to hold the election to the Gram Panchayats. Thereafter, steps were taken to hold the election to the Gram Panchayats. First step was taken for preparation of the voters' list and a time schedule for preparation of the same was published, according to which the time between 1-11-2000 to 20-11-2000 was fixed as the date for preparation of the voters' lists according to the territorial constituency wise. After preparation, objections with regard to the same were invited between 21-11-2000 to 30-11-2000, regarding any omission or defect in the voters' lists. Objections were received and they were disposed of by the officers concerned and, thereafter, the final publication of the voters' lists was made on 1-12-2000 and according to the appellant, the printing of the voters' lists was done between 2-12-2000 to 20-12-

2000.

4. On the recommendation of the State Election Commission for constituting the Gram Panchayats, the Governor issued a notification on 3-2-2001 in exercise of the power under Section 136-A of the Act for holding election to the Gram Panchayat and, according to the schedule, the first round of election was to commence from 11-4-2001. After notification was issued for holding elections, a large number of writ applications were filed before this Court with regard to the irregularities in preparation of the voters' lists. The main grievance in the said writ applications was with regard to the omission of the names of the voters in the voters' lists prepared for holding the Gram Panchayat elections. The learned Single Judge heard the matter, allowed the writ applications, and passed the aforesaid directions. Being aggrieved by the order of the learned Single Judge, the State Election Commissioner has filed these appeals.

5. Learned counsel appearing for the appellant submitted that in view of the legal bar created by Article 243O of the Constitution and the provisions contained under Sections 137-A, 140 and 143 of the Act, no matter relating to election on any ground shall be called in question, except by election petition. The learned Single Judge should not have interfered with the process of election and directed for preparation of the supplementary voters' lists as that will amount to interrupting, delaying or postponing the process of election. He further submitted that the main grievance in the writ applications before the learned Single Judge was with regard to breach of certain statutory provisions of the Act and the Rules in connection with the preparation of the voters' lists. The said ground can be urged after election is over as one of the grounds for declaring the election to be void under Section 144(d)(iv) of the Act by filing election petition. The said breach cannot be a ground to interfere under Article 226 of the Constitution as any direction for preparation of the voters' list on the basis of allegation of names of some voters having been omitted from the voters' list will be in effect an unending process and that, in fact, would postpone the process of election.

6. The writ petitioner-respondents in spite of valid service of notice have not appeared, but two sets of intervenors have appeared. It was submitted on their

behalf that a large scale of bungling has been done in preparation of the voters' lists of the Gram Panchayats. Their names appeared in the voters' lists prepared for holding Legislative Assembly election, but the same were missing in the voters' lists prepared for the Gram Panchayats and as such, the directions were rightly issued by the learned Single Judge to prepare a supplementary voters' list.

7. The only question that falls for consideration is as to whether when the election process has started by issuance of a notification under Section 136-A of the Act, this Court in exercise of power under Article 226 of the Constitution will issue direction for preparation of the supplementary voters' lists oh the basis of breach of the provisions of the Act and Rules concerning the preparation of the voters' lists.

8. To decide the said question, it is apt to mention the relevant provisions. As stated above to bring the democracy at the grass-roots level, Part IX was inserted in the Constitution providing for constitution, composition and holding regular elections to the Gram Panchayats. Article 234K of the Constitution contains a provision with regard to elections to the Panchayats and it provides, inter alia, that the superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats shall be vested in the State Election Commission consisting of a State Election Commissioner to be appointed by the Governor. Article 243O creates a bar to interference by Courts in electoral matters. It provides, inter alia, that notwithstanding anything in the Constitution, no election to any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State. This provision is similar to the provisions contained in Article 329 of the Constitution, which bars interference of Courts in election matter concerning Parliament and Legislative Assembly. Section 12 of the Act speaks of composition of Gram Panchayat, which consists of Mukhia and other members directly elected as provided therein. The Act was amended from time to time. Section 137-A was inserted by the Bihar Panchayat Raj (Amendment) Act, 1995 (Bihar Act 14,1995), which runs as follows:

137-A. Electors of Panchayat.~A\ such persons who are enrolled as electors in the electoral rolls or that part of the rolls of the State Legislative Assembly

Constituency for the time being in force which is concerned with the Territorial Constituency of any Gram Panchayat shall be the electors for Panchayat Elections concerned.'

According to the said provision, the electoral rolls of the State Legislative Assembly Constituency for the time being in force as is concerned with the territorial constituency of any Gram Panchayat will be treated as electoral rolls for the purposes of the Gram Panchayat elections concerned.

9. Two provisions were added to Section 137-A by Bihar Panchayat Raj (Second Amendment) Act, 1995 (Bihar Act 5,1996), which are as follows:

Provided that the State Election Commissioner 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 territorial constituency concerned 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 Governor under Section 136-A of the Act.

The first proviso empowered the State Election Commissioner to make changes in the electoral rolls of the territorial constituency concerned of the Panchayat for sufficient reasons either suo motu or on receipt of written representation and the second proviso provided that no such change of the electoral roll shall be made after the notification of the date of Panchayat election by the Governor under Section 136-A of the Act.

10. Chapter IV of the Rules deals with the electoral roll and Rules 19 to 25 deal with the preparation of the voters' list disposal of objection etc. Rule 19 contains a provision with regard to preparation of the voters' list constituency wise by the District Election Officer under the direction, control and supervision of the State Election Commission. Rule 20 empowers the District Electoral Officer to take help of other Government servants for preparation of the electoral roll. Rule 21 speaks of the preparation of territorial constituency wise voters' list, on the basis of which

the voters' list of the constituency concerned will be prepared. Rule 22 speaks of publication of the voters' list for a period of ten days at the places specified therein and Rule 23 empowers the District Election Officer Officer to modify or remove the error in the electoral roll under the direction, control and supervision of the State Election Commission Rule 24 content a provision with regard to obtaining copy of the voters' list on payment of fee. Rule 25 provides for safe custody of the voters' list.

11. Section 140 of the Act provides that the election to any office of a Panchayat or a Gram Katchahry shall not be called in question except by an election petition as prescribed and Section 143 contains a provision regarding bar to interference by Courts in electoral matters, which is in the same terms as provided under Article 243O of the Constitution, which provides, inter-alia, that no election to any Panchayat shall be called in question except by an election petition. Section 144 contains a provision to declare the election to be void and for the purpose of the present case, the provision contained under Section 144(1)(d)(iv) is relevant, which provides that if the result of the election concerning the returned candidate has been materially affected by any non-compliance of the provisions of the Act or of any rules or orders made thereunder, the election of the returned candidate may be declared as void.

12. Thus, the combined reading of the aforesaid provision amply shows that a complete machinery has been provided under the Act for preparation of the voters' list and the disposal of objections and the voters' list is prepared under the control, direction and provision of the State Election Commission, which has been vested with the power to do the same by the Constitution as well as by the statutory provisions as mentioned above. The provisions further show that the electoral rolls of Assembly Constituency for the time being in force as relating to a particular Panchayat will be the electoral rolls for the purposes of election of the Gram Panchayats subject to their revision or modification done in terms of the provisions contained under first proviso to Section 137-A of the Act and the Rules contained under Chapter IV of the Rules. However, no change in the electoral roll with regard to any Gram Panchayat shall be made after the notification of the date of the Panchayat election by the Governor under Section 136-A of the Act. In other

words, once the notification has been issued for holding the Panchayat elections, then the authority will not exercise the power to make amendment, change or correction in the electoral roll even if he is empowered to do so under the provisions as mentioned above. It is also clear that when the process of election has started, the jurisdiction of the Courts to interfere therewith is barred and after election is over, the election can be called in question by an election petition on the ground mentioned under Section 144 of the Act.

13. At this stage, If would like to state that the provisions as contained in Article 243O of the Constitution as well as in the Act with regard to the bar to the jurisdiction of the Courts to interfere in election matters, while the election is on are the same as in Article 329 of the Constitution creating a similar bar with regard to elections to the Parliament and Legislative Assembly. The provision contained under-Section 144 of the Act stating the grounds for declaring the election to be void in an election petition is also the same as is the provision contained under Section 100 of the Representation of the People Act, wherein the grounds have been given for declaring the election of the Parliament and Legislative Assembly to be void.

14. The question as to whether the High Court in exercise of power under Section 226 of the Constitution can interfere with the election when its process has started in view of the bar created by Article 329(b) of the Constitution has been subject-matter of decision by the apex Court in.several cases. The said question was considered by the two Constitution Benches of the Supreme Court in the case of N.P. Ponnuswamiv. Returning Officer, Namakkal Constituency, reported in : [1952]1SCR218 as well as in the case of Mohinder Singh Gill v. Chief Election Commissioner reported in : [1978]2SCR272 . Recently a Three Judge Bench of the Supreme Court in the case of Election Commission of India v. Ashok Kumar : AIR 2000 SC2979 considered this question and summed up the law in paragraph 32 of the judgment, which runs as follows:

32. For convenience, 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 there from 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 proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of proceedings in elections.

(2) Any decision sought and rendered will not amount to 'calling in question an election' if it subserve the progress of the election and facilitates the completion of the election. Anything 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 or orders issued by Election Commission are open to judicial review on the well-settled parameters which enable judicial review of decisions of statutory bodies such as on a case of mala fide 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 proceedings, 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 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, protracting or stalling of the election proceedings. Care has to be taken to see that there is no attempt to utilise 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 put by raising the pleas with particulars and precision and supporting the same by necessary

material.

In paragraph 33 of the judgment, their Lordships held that the conclusions enumerated in paragraph 32 will not be considered as a summary of the judgment. The same have to be read along with earlier part of the judgment, where the conclusions have been stated. In this connection, the conclusion arrived at in paragraph 29 of the judgment has to be also quoted, which is relevant for the purposes of the present case, which runs as follows:

29. Section 100 of the Representation of the people Act, 1951 needs to be read with Article 329(b), the former being a product of the latter. The sweep of Section 100 spelling out the legislative intent would assist us in determining the span of Article 329(b) though the fact remains that any legislative enactment cannot curtail or override the operation of a provision contained in the Constitution. Section 100 is the only provision within the scope of which an attack on the validity of the election must fall so as to be a ground available for avoiding an election and depriving the successful candidate of his victory as the polls. The Constitution Bench in Mohinder Singh Gill's case {vide SCC P. 429, para 33) asks us to read Section 100 widely as 'covering the whole basket of grievances of the candidates'. Sub-clause (iv) of clause (d) of Sub-section (1)) of Section 100 is a 'residual catch-all clause'. Whenever there has been non-compliance with the provisions of the Constitution or of the Representation of the People Act, 1951 or of any rules or orders made therein if not specifically covered by any other preceding clause or sub-clause of the Section it shall be covered sub-clause (iv). The result of the election in so far as it concerns a returned candidate shall be set aside for any such non-compliance, as the above said subject to such non-compliance, also satisfying the requirement of the result of the election having been shown to have been materially affected insofar as a returned candidate is concerned. The conclusions which inevitably follow are; in the field of election jurisprudence, ignore such things as do not materially affect the result of the election unless the requirement of satisfying the test of material effect has been dispensed with by the law, even if the law has been breached and such breach satisfies the test of material effect on the result of the election of the returned candidate yet postpone the adjudication of such dispute till the election proceedings are over so as to

achieve, in larger public interest, the goal of constituting a democratic body without interruption or delay on account of any controversy confined to an individual or group of individuals or single constituency having arisen and demanding judicial determination.

15. Thus, according to the law settled by the apex Court once the election process has started, it should be concluded as early as possible and according to time schedule and there should be no undue interference by the Court. Judicial remedy is not available while the election process has started to decide the question, which has the effect of interrupting, obstructing and protracting election proceedings. However, judicial intervention is available if assistance of the Court has been required to correct or smoothen the progress of the election proceeding or to remove obstacle therein, or to preserve a vital piece of evidence, or the decisions are necessary to subserve the progress of the election and facilitate the completion of election. It has also been held in paragraph 29 of the aforesaid judgment that even though there is a breach of statutory provision while the election has started and the said branch may materially affect the result of the election so far as the returned candidate is concerned then adjudication of such dispute has to be postponed till the election proceedings are over in the larger public interest.

16. Question for consideration in these appeals is as to whether any direction for preparation of the supplementary voters list after the notification for holding election has been issued under Section 136-A of the Act will subserve the progress of the election and facilitate the completion of election or it will amount to interrupting, obstructing or protracting the process of election.

17. In my view the only grievance is that the voters' list has not been prepared according to the statutory provisions resulting iff denial of right to vote to a large number of voters. From the perusal of the provisions as quoted above, it is clear that the election as it concerns the returned candidate will be set aside for non compliance of the statutory provisions continued under the Act or the Rules if the election has been materially affected so far as the returned candidate is concerned. The said ground can be taken in the election petition after the election

is over, but such dispute cannot be decided under Article 226 of the Constitution of India while the process of election is on. The present case is fully covered by the conclusion arrived at by the Supreme Court at paragraph 29 of the judgment in the case of Ashok Kumar (supra).

18. In the case of Lakshmi Charan Sen v. A.K.M. Hassan Uzzaman : (1985)4SCC689 , the apex Court held even if certain claims and objections with regard to electoral rolls are not finally disposed of despite filed according to law, the same cannot be a ground to postpone the election to the legislature. The election has to be held on the basis of the electoral roll, which is in force on the last date for making nominations.

19. Similar question as involved in the present case came up for consideration before the apex Court with regard to Municipal election in Uttar Pradesh in the case of Anugrah Narain Singh v. State of U.P. : (1996)6SCC303 where the election of Municipality was to be held after ten years and challenge to the election was made on the ground of electoral roll and other grounds. The apex Court held that so far as preparation of the electoral roll is concerned, there are sufficient safeguards under the Act and the Rules and there is hardly any scope for the High Court to intervene and correct the electoral roll under Article 226 of the Constitution. If the Court will intervene during the process of election with regard to correction of electoral roll then the election will be indefinitely delayed and it will not be possible to comply with mandate of the Constitution of holding the election to the Municipality. In paragraph 28 of the said judgment, it was held as follows:

28. Therefore, so far as preparation of the electoral roll is concerned there are sufficient safeguards in the Act against any abuse of misuse of power. In view of these provisions and particularly, in view of Sub-section (6) of Section 39 which provides for appeals in regard to inclusion, deletion or correction of names, there is hardly any scope for a Court to intervene and correct the electoral rolls under Article 226 of the Constitution. In fact, if this is allowed to be done, every election will be indefinitely delayed and it will not be possible to comply with the mandate of the Constitution that every Municipality shall have a life span of five years, or less, if dissolved earlier, and thereafter fresh elections will have to be held within the

time specified in Clause (3) of Article 243U. Having regard to the provisions for filing objections and also the right of appeal against inclusion, deletion and correction of names and also to the constitutional authority of the Election Commission to give directions in all matters pertaining to elections, the Court should not have intervened at all on the basis of allegations as to preparation of electoral rolls.

It was further held in that case that the election cannot be allowed to be stalled on the complaint of a few individuals causing grave injustice to crores of other voters who have a right to elect their representatives to the local bodies. It was held in paragraph No. 14 as follows:

14...Importance of holding elections at regular intervals for Panchayats, municipal bodies or legislatures cannot be overemphasized. If holding of elections is allowed to be stalled on the complaint of a few individuals then grave injustice will be done to crores of other voters, who have a right to elect their representatives to the local bodies as a result of the order of the High Court, elections that were going to be held to the local bodies after a long lapse of nearly ten years were postponed indefinitely.

20. In the case of C. Subrahmanyam v. K.Bamanjaneullu (1998) 8 S.C.C. 703, it was held by the apex Court that non-compliance with the provisions of the Andhra Pradesh Panchayat Raj Act will be a ground for election petition and the writ petition is not maintainable while the election process is started.

21. Once the process of election has started, any interference by the Court under Article 226 of the Constitution with the process of ejection on the ground of breach of statutory provisions in preparation of the voters' list is not permissible in law. If this will be allowed to be done, the same will delay the election. In other words, it will interrupt and obstruct the process of election. Such question has to be postponed till the election is over. Non-compliance of the provisions of the Act or Rules or the Order may be a ground to declare the election to be void after the election is over if the result of the election in-so-far as it concerns a returned candidate has been materially affected. Any interference by this Court on the said ground will interrupt of delay the election, which is being held after 22 years.

22. In the result, the order passed by the learned Single Judge is set aside and all the appeals are allowed.

S.K. Katriar, J.

23. I agree.

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