

Birendra Kumar Vs. the State Election Commission and ors.

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Court : Patna

Decided On : Jun-21-2004

Judge : Chandramauli Kumar Prasad, J.

Acts : Bihar Panchayat Raj Act, 1993 - Sections 140; [Constitution of India](#) - Article 243; Limitation Act - Sections 5

Appeal No. : C.W.J.C. No. 4123 of 2002

Appellant : Birendra Kumar

Respondent : The State Election Commission and ors.

Advocate for Def. : K.B. Nath, Adv. and Mahendra Thakur and Dilip Kumar Mishra, Adv. for Respondent Nos. 4 and 5

Advocate for Pet/Ap. : Ram Balak Mahto, Sr. Adv. and Ajay, Adv. Rajeshwar Prasad, GP VI

Disposition : Application allowed

Judgement :

Chandramauli Kumar Prasad, J.

1. Petitioner as also respondent No. 4 contested for election to the office of the Mukhiya of Gram Panchayat, Katchore for which the election was held on

19.4.2001. In the said election, petitioner (hereinafter referred to as the returned candidate) was elected Mukhiya and respondent No. 4 (hereinafter referred to as the election petitioner) lost. Election petitioner filed application challenging the election of the returned candidate, which was registered as Election Petition No. 28 of 2001. The election petition presented by the election petitioner was barred by limitation but the learned Munsif by order dated 11.7.2001 condoned the delay in its filing, on an application filed by the election petitioner under Section 5 of the Limitation Act and thereafter transferred the case to the Court of 2nd Additional Munsif for trial. During the trial of the election petition one of the issues framed was as follows :

'Is the Court competent to condone the delay in filing this election petition under Section 5 of the Limitation Act?

2. The aforesaid issue was taken up for consideration by the learned Munsif as a preliminary issue and by order dated 6.3.2002 answered the same in favour of the election petitioner and against the returned candidate/While doing so, the learned Munsif observed that once his predecessor-in-office had condoned the delay in filing the election petition, it has no jurisdiction to review/rescind the said order.

3. It is this order of the learned Munsif which has been assailed in the present application and prayer has been made to issue a writ in the nature of certiorari quashing the order dated 6.3.2002 passed by the 2nd Additional Munsif, Sitamarhi in Election Petition No. 28 of 2001.

4. Mr. Ram Balak Mahto, Senior Advocate appears on behalf of the petitioner whereas State Election Commission is represented by Mr. K.B. Nath. State is represented by Mr. Rajeshwar Prasad, GP VI and respondents 4 and 5 are represented by Mr. Mahendra Thakur and Dilip Kumar Mishra.

5. Mr. Mahto contends that the Bihar Panchayat Raj Act, 1993 and the Rules framed thereunder govern the field which is complete in itself and as such the provision of Section 5 of the Limitation Act shall not be available for condoning the delay in filing the election petition. In any view of the matter, Mr. Mahto contends that election petition being an original proceeding, Section 5 of the Limitation Act

shall not be applicable for condoning the delay in filing the election petition. In support of his submission he has placed reliance on a judgment of the Supreme Court in the case of Hukumdev Narain Yadav v. Lalit Narain Mishra, AIR 1974 SC 480 and my attention has been drawn to paragraph 25 of the judgment, which reads as follows :

'25. For all these reasons we have come to the conclusion that the provisions of Section 5 of the Limitation Act do not govern the filing of election petitions or their trial and, in this view, it is unnecessary to consider whether there are any merits in the application for condonation of delay.'

6. Mr. Mishra, however, contends that in view of Section 29(2) of the Limitation Act, the delay in filing the election petition can be condoned on sufficient cause being shown under Section 5 of the Limitation Act. He further submits that Section 5 of the Limitation Act covers the election petition also. He emphasises that election petition having once presented has to culminate in final judgment and cannot be dismissed even on the ground of limitation in mid way.

7. The rival submission necessitates examination of the provisions of Bihar Panchayat Raj Act, 1993 and the Bihar Panchayat Election Rules, 1995 and poses a question as to whether the Limitation Act applies in case of election petition presented under the Bihar Panchayat Raj Act, 1993.

8. Article 243O of the [Constitution of India](#), inter alia, provides that 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 or by order any law made by the Legislature of State. In exercise of the powers conferred on the State Legislature it has enacted Bihar Panchayat Raj Act, 1993 (hereinafter referred to as the Act) and Section 140 thereof provided as follows :

'140. Election Petition.--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 :

Provided that if an election to any office of a Gram Panchayat or Gram Katchahry is under dispute the election petition shall lie before such Munsif within whose jurisdiction such Gram Panchayat or Gram Katchahry, as the case may be, is situated and if the election to any office of Panchayat Samiti or to a Zila Parishad is under dispute, the election petition shall lie before such sub-Judge within whose jurisdiction such Panchayat Samiti or Zila Parishad, as the case may be, is situated.'

9. The Bihar Panchayat Election Rules, 1995 framed under Section 121 of the Act provides for the manner in which election to the Panchayat can be questioned. Rules 108 to 114 provide for the presentation of the election petition, limitation, Court fees, verification, hearing, withdrawal, order etc. on election petition. Same are quoted below :

'108. Election Petition.--Election petition against any elected candidate may be filed under Section 140 of the Act before the prescribed Court within thirty days of the declaration of the election result.

109. Court fees.--(1) Court fees payable for election petition with regard to any post of the Gram Panchayat/Gram Kutcherry will be rupees one hundred.

(2) Court fees payable for election petition with regard to any post of the Panchayat Samiti/Zila Parishad will be rupees two hundred.

110. Verification of facts of election petition.--The election petition will contain such facts and details on which the plaintiff depends. The plaintiff will sign the election petition and in the manner prescribed under Order VI of the Civil Procedure Code, 1908 verify his pleadings.

111. Hearing of election petition.--The competent Court will hear the election petition in the manner prescribed by Civil Procedure Code, 1908.

112. Withdrawal of election petition.--The election petition cannot be withdrawn without the order of the Court :

Provided that if there be more than one plaintiff in the election petition then the election cannot be withdrawn without unanimous consent.

113. Application of the provisions of the Indian Evidence Act in the hearing of the election petition.--In the hearing of the election petition the Indian Evidence Act, 1872 will apply.

114. Order on election petition.--(1) If the Court/the prescribed authority after hearing decides that the elected person is guilty of misconduct under the provisions of Section 144 or 146 of the Act, he may declare the election of the elected candidate illegal and may order for re-election.

(2) The Court/Prescribed Authority under the provisions of Section 145 of the Act may declare any other candidate elected.

115. Copy of the order on election petition to be made available.--The copy of the order passed on the election petition by the Court/Prescribed Authority will be made available to the District Election Officer and the Commission.'

10. Section 29 of the Limitation Act which is relevant for the purpose reads as follows :

'29. Savings.--(1) Nothing in this Act shall affect Section 25 of the Indian Contract Act, 1872 (9 of 1872).

(2) Where any special or local law prescribed for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law.

(3) Save as otherwise provided in any law for the time being in force with respect to marriage and divorce, nothing in this Act shall apply to any suit or other

proceeding under any such law.

(4) Sections 25 and 26 and the definition of 'easement' in Section 2 shall not apply to cases arising in the territories to which the Indian Easements Act, 1882 (5 of 1882), may for the time being extend.'

11. It is evident that election to any office of the Panchayat can be called in question by filing an election petition as provided under Section 140 of the Act and the limitation prescribed for filing of the election petition is within 30 days of the declaration of the election result, which would be evident from Rule 108 of the Rules. There is no provision either in the Act or the Rules made thereunder for dismissal of the election petition presented under the Act in case it is not filed within 30 days of the declaration of the election result, unlike election petition filed under the Representation of the People Act or the Bihar Panchayat Raj, Act, 1947 and the Bihar Panchayat Election Rules, 1959 framed thereunder. It is relevant here to state that Section 81 of the Representation of People Act provides for filing of an election petition within 45 days and Section 86 thereof provides for dismissal of an election petition if it does not comply with the provision of Section 81 besides few other provisions of the Act. Similarly Rule 72(2) of the Panchayat Election Rules, 1959 provided for presentation of the election petition within 30 days and Rule 77 thereof contemplated summary dismissal of the election in case of failure to comply the provision of Rule 72(2) of the said rules besides other rules. Thus in the election petition filed under the Representation of the People Act and filed under the provisions of the Panchayat Election Rules, 1959, in view of the consequences provided, the provision of the Limitation Act was found to be not available.

12. However, same does not solve the problem so far as it concerns the presentation of the election petition under the Act and the Rules framed thereunder. Relevant provision of the Act and the Rules have been quoted above and they do not provide for any consequences when the election petition is presented beyond the period of limitation and in such circumstances can it be said that Section 5 of the Limitation Act can be invoked to condone the delay in filing the application.

13. Having given my most anxious consideration, I am of the opinion that Section 5 of the Limitation Act shall not be available for condonation of the delay in filing the election petition filed under the Act and the Rules made thereunder for the reasons hereinafter mentioned.

14. From a plain reading of Section 29(2) of the Limitation Act it is evident that provision of Sections 4 to 24 thereof shall apply, only when they are not expressly excluded by special or local law. While going through the Act and the Rules, framed thereunder i.e. the special law in the context had not expressly excluded the application of Section 5 of the Limitation Act but the question is as to whether its application is excluded by necessary implication and whether this can be examined or the Court has to fold its hand once it comes to the conclusion that there is no provision for excluding the applicability of the Limitation Act. In view of the decision of the Supreme Court in the case of Hukumdeo Narain Yadav (supra) this question need not detain me any further. Relevant portion of the judgment reads as follows :

'In our view, even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the Court to examine whether and to what extent the nature of the subject-matter and scheme of the special law exclude their operation.'

15. Not the question is as to whether the provision of the Act and the Rules by necessary implication exclude the application of Section 5 of the Limitation Act. Article 243O(b) of the Constitution, inter alia, provides that no election can be called in question except by an election petition in the manner as provided for by or under the law made by the legislature of the State. Section 140 of the Act made by the State Legislature contemplates that election to an office of Panchayat shall not be called in question except by an election petition as prescribed. One of the prescriptions for presenting the election petition is the requirement of its filing within 30 days of the declaration of the election result under Rule 108 of the Rules. Use of the expression 'no' under Article 243O of the Constitution and Section 140 of the Act in my opinion clearly gives an impression that the supreme law of the

country and the law made by the legislature indicate their intention not to entertain the election petition unless presented in the manner prescribed. It is well settled that use of negative words by the law makers indicate the clear intention for its compliance. From the conspectus of the discussion aforesaid, I come to the conclusion that the nature of subject matter and scheme of the Act and the Rule i.e. special law had excluded the application of Section 5 of the Limitation Act.

16. In my opinion, any other view shall make the result of the election vulnerable for long time. It is worth mentioning here that the right of file the election petition is not confined to the candidates in the election but can be filed by others and in case it is held that provision of Section 5 of the Limitation Act would apply, any body can be prompted to file application after the period of limitation and there will be no dearth of such person in a large area who may be sick and satisfy the requirement of sufficient cause for condoning the delay.

17. In view of discussion aforesaid, it is not necessary to answer another submission of Mr. Mahto that even if Section 5 of the Limitation Act is held to be applicable the election petition does not come within its purview.

18. I further do not find any substance in the submission of Mr. Mishra that once the election petition has been filed it has to culminate in judgment and cannot be dismissed in between. As held earlier, challenge to an election is permissible only by way of an election petition in accordance with the procedure prescribed and in case it is not presented in accordance with the procedure prescribed, nothing prevents the Munsif hearing the same to dismiss the application in between or at the threshold.

19. In the result, the application is allowed, impugned order is set aside and it is held that the election petition being barred by limitation is fit to be dismissed on the said ground. In the facts and circumstances of the case, there shall be no order as to cost.