

Court No. - 2

Case :- MISC. BENCH No. - 11051 of 2021

Petitioner :- Neelam Yadav

Respondent :- State Of U.P. Thru. Prin. Secy. Panchayat Raj & Others

Counsel for Petitioner :- Shobhit Mohan Shukla

Counsel for Respondent :- C.S.C., Atul Kumar Dwivedi, Rohit Tripathi

Hon'ble Rajan Roy, J.

Hon'ble Saurabh Lavania, J.

By means of this writ petition the petitioner has challenged a decision/letter dated 06.05.2021 issued by the opposite party no. 2, i.e., the State Election Commission and another order dated 08.05.2021 issued by the District Election Officer/District Magistrate, Amethi.

The facts of the case, in brief, are that the petitioner contested the election for Member, Zila Panchayat for Ward No. 28, Amethi. The opposite party no. 6 herein also contested for the same office. The elections were held, votes were counted and as per the result, the petitioner had secured 3149 votes, whereas the opposite party no. 6 had secured only 3046 votes, therefore, a certificate of election was issued to the petitioner on 04.05.2021. On 04.05.2021 itself, before the petitioner could take oath, the opposite party no. 6 submitted a representation to the Assistant Returning Officer, copy of which is annexed as Annexure No. CA-3 to the counter affidavit of opposite party no. 6 stating that two booths bearing number 79 and 80 which were part of ward no. 28 and in which voting had taken place and the votes polled therein which had been counted were not included in Form-50 while calculating the number of votes polled by the respective candidates. It is said that at that time the opposite party no. 6 was not aware that the same error had been committed in respect to the votes polled and counted at booth nos. 120, 121, 134, 138 and 150 which were also part of ward no. 28 and that the votes polled and counted in respect to these booths were erroneously included in Form-50 of adjoining ward no. 29 of which they were not a part. Likewise Booth no. 100 which was part of ward no. 29, the votes polled and counted in respect thereof were included in Form no. 50 pertaining to ward no. 28, i.e., the ward of rival private parties herein. The Assistant Returning officer rejected the said application of the opposite party no. 6.

We have perused the order of the Assistant Returning Officer

passed on the application of the petitioner. On a bare reading, it is apparent that the A.R.O./R.O., Amethi misread the application of the petitioner as if he was complaining about inclusion of Booth nos. 79 and 80 in ward no. 28 which in fact were part of ward no. 29, whereas, in fact, the opposite party no. 6 had submitted just the opposite in his application. After misreading it he opined that ward nos. 79 and 80 were part of ward no. 29 and that is how counting had been done, which was factually incorrect.

Being aggrieved the opposite party no. 6 approached the opposite party no. 2, i.e., the State Election Commission, which, on 06.05.2021, passed an order, a copy of which is also annexed as part of Annexure CA-4 to the counter affidavit of opposite party no. 6, by which, the Election Commission ordered the District Magistrate/District Returning Officer (Panchayat and Nagariya Nikay), Amethi, to get the facts inquired and to take action in accordance with Rules. Thereafter the matter was got inquired and as is evident from Annexure-1, which is an order passed by the District Returning Officer, Zilla Panchayat, Amethi, dated 8 May 2021, it was found that in fact ward nos. 79, 80, 120, 121, 134, 138 and 150 were part of ward no. 28 for which the petitioner and opposite party no. 6 had contested for the office of Member Zila Panchayat, but, erroneously, the votes polled and counted in respect of these booths were not entered in Form-50 pertaining to ward no. 28, instead, they were included in Form-50 pertaining to ward no. 29, in which they did not fall. Likewise the votes pertaining to Booth number 100 were counted for ward no. 28, though, the said booth fell in ward no. 29. After inclusion of the votes cast at aforesaid omitted booths to the votes pertaining to ward no. 28 it was found that the petitioner Neelam Yadav had polled 3329 votes, whereas, the opposite party no. 6, Smt. Krishna Devi had polled 3557 votes. There was a difference of 2367 in the valid votes as considered earlier and the one which were actually polled. Accordingly, based on this exercise, modified result of election was declared and Form-50 was also modified on the same terms. The opposite party no. 6 was declared elected. The certificate of election issued to the petitioner erroneously, was cancelled. It is an admitted fact that the opposite party no. 6 has taken oath as a consequence thereof.

Contention of the learned counsel for the petitioner was that once the result had been declared on 4.5.2021 the returning officer became *functus officio*, therefore, he could not have cancelled the certificate of election issued in favour of the petitioner nor could he have issued it in favour of the opposite party no. 6. He could not have recalled, reviewed or cancelled the certificate of election already issued, that too, without any

opportunity of hearing. In this regard he relied upon various decisions rendered by coordinate benches of this Court reported in **1995 (2) U.P.L.B.E.C. 771, Smt. Ram Kanti v. District Magistrate, Hamirpur & ors.**; **2006(1) U.P.L.B.E.C. 372, Sunita Patel v. State of U.P. & ors. (Civil Misc. Writ Petition No. 29629 of 2000)**; other decisions rendered in **Writ Petition No. 5562 (MB) of 2005, Pancham & ors. V. State of U.P. & ors.**; **Writ-C No. 12685 of 2021, Ram Achal v. State of U.P. & ors.**, wherein, it has been held that once the result of election is declared, then, the returning officer and the Election Commission become *functus officio* and cease to have jurisdiction over the elections. They cannot cancel the declaration of result or direct fresh poll and it is the Election Tribunal alone which is competent to deal with the dispute arising out of or in connection with the election. The election commences from the initial notification and culminates in the declaration of a return of a candidate. Election process, thus, comes to an end on the final declaration of returned candidates. Learned counsel also relied upon Article 243-O of the Constitution of India in support of his contention.

Learned counsel for the petitioner placed heavy reliance upon a document annexed as Annexure S.A.-2 with its affidavit dated 05.05.2021 by the Election Commission to contend that the election process was over and the same was denotified on 6.5.2021 as per the Election Commission itself, therefore, the cancellation of the certificate of election issued to the petitioner on 8.5.2021 is erroneous in law and without jurisdiction.

On the other hand Dr. L.P. Mishra, learned counsel for the opposite party no. 6 contended that the election at hand is a 3-tier election involving election to the Gram Panchayat, Kshetra Panchayat and Zila Panchayat, therefore, the process of election does not come to an end till the elections to the office of the Chairman, Zila Parishad are held. He submitted that on 4.5.2021 when the result was erroneously declared without taking into consideration the votes polled on booth no. 79, 80, 120, 121, 134, 138 and 150 which fell in Ward No. 28, the opposite party no. 6 submitted an application to the A.R.O./R.O., but he misread the application and passed an absurd order. Had the A.R.O./R.O. applied his mind to the facts of the case, this situation would not have arisen. He submitted that sanctity of elections is to be maintained and all endeavour should be made to ensure free and fair election. Nobody should get elected by default or merely because the concerned official committed an error. It would be a death knell for democracy, if this is permitted. He submitted that the votes were not only polled on the aforesaid booths, but, were also counted. The error occurred in not including these votes in Form-50 which is

the final Form prepared containing the result of elections and is referable to Schedule-12. He relied upon a Division Bench judgment of this Court reported in **2011 (1) ADJ 287, Smt. Tara Devi v. State of U.P. & ors.**, wherein, the earlier decisions which have been relied by the petitioner's counsel, have been considered and according to him it has been held that formal declaration of result under Rule 54 will abide by Rule 56 of the Rules 1994. In other words, when declaration of result under Rule 54 is formal one, declaration of result is subject to Rule 56 which is final one. It has been held that it is an admitted position that election starts with notification and finishes with denotification. Scope of election petition arises thereafter, but, during this period Election Commission is the final authority at the entire process. Therefore, after formal declaration of result by the returning officer, if he is called upon by the other authorities under Rule 56 to remove the defects which are either minor or formal or inadvertent and he removes the same, neither he can be said to have become *functus officio* nor can it be said to be outside the scope and jurisdiction of the Election Commission or any authority thereof.

Dr. Mishra further submitted that even otherwise the error is apparent on the face of the record and there is no denial of it. In this context he invited attention of the Court to para-15 of counter affidavit of opposite party no. 6, wherein, a specific averment has been made about the fact that certain booths, already referred hereinabove, were part of Ward-28 and not Ward-29, but, the votes pertaining to said booths were counted in Ward-29 erroneously. The polling booth lists relating to election of Member of Zila Panchayat of Ward No. 28 and 29 have also been annexed as Annexure C.A.6-A and C.A.6-B. In this context he submitted that in the index the said annexure had incorrectly been mentioned as relating to Ward-29. He submitted that these averments in para-15 have not been specifically denied in the rejoinder affidavit. He invited our attention to para-20 thereof. He further contended that the error being unrebutted this court would not, by interfering in the matter, revive an illegality. The requirement of free and fair election is paramount, therefore, this Court should not interfere in the matter. He also submitted that the impugned order has not affected the result of election of members of Ward No. 29 which remains as it is.

Sri Rohit Tripathi, learned counsel appearing for the Election Commission submitted that the error had in fact occurred which was apparent as was found in the inquiry, therefore, the said error has been rectified. The Election Commission is bound to ensure free and fair election as such this is not a matter where the Court should interfere.

We specifically asked Sri Tripathi as to whether there is any provision for denotification of elections ? This question was put by us to other counsels also, but none of them could place before us any provision in the Kshetriya Panchayat and Zila Panchayat Adhiniyam 1961 or Rules made thereunder regarding denotification of elections. When we invited attention of Sri Tripathi to the document annexed by the Election Commission and relied by the petitioner to contend that elections were denotified on 06.05.2021, he contended that there is no provision for denotification and the said document was issued only for the reason that as the voting having taken place the Model Code of Conduct have come to an end. He further submitted that though the said order is not happily worded, but, this was the intent of the Election Commission.

We also asked Sri Tripathi as to when was the result of the Election declared in terms of Rule 54 of the U.P. Kshetriya Panchayat and Zila Panchayat (Election of Members) Rules 1994 and when was the report of the result sent to the Election Commission and received by it, he submitted that he would have to seek instructions. After seeking instructions he came back and informed that no intimation about the initial result in which the petitioner Smt. Neelam Yadav was declared elected, was ever provided by the District Magistrate. Information about final result in which the opposite party no. 6 was declared elected was uploaded on the Election Commission's website on 09.05.2021 at 12:42 PM. He, however, also submitted that the District Magistrates/Returning Officers on their own upload the results on the website of the Election Commission.

Sri Tripathi also relied upon judgment of the Division Bench in Tara Devi's case (supra). He referred to the averments made in the counter affidavit of the Election Commission to contend that the Election Commission on receipt of a representation from opposite party no. 6 on 06.05.2021 ordered an inquiry in the matter, in response to which the District Magistrate by means of his letter dated 06.05.2021 directed the A.D.M. (Finance & Revenue)/Deputy Electoral Officer, Amethi to conduct an inquiry and furnish a report. In compliance of the said direction the A.D.M. (Finance and Revenue) submitted an inquiry report by means of letter dated 08.05.2021. In the said report it was specifically mentioned that votes polled at Poling Center 79, 80, 120, 121 (Part), 134 (Addl. Room No. 1), 138 (Room No. 1), 158 (Room No. 1) were left out in the final tabulation for ward No. 28, therefore, keeping in view the abovenoted mistake it was decided that appropriate decision be taken for the purpose of rectifying the error, consequently an amended Form-50 was prepared and on the basis of same, certificate issued in favour of petitioner was cancelled, and fresh certificate was issued in

favour of opposite party no. 6 who had polled higher votes than the petitioner. It was a bona fide decision in order to ensure that the sanctity of the electoral process is maintained in terms of the tone and tenor of the constitutional mandate of conducting free and fair election. The error being apparent and it having been rectified this Court should not interfere in the matter under Article 226 of the Constitution of India.

We have also been informed by Sri Tripathi that proceedings have been ordered against the A.R.O./R.O. who had rejected the representation of the opposite party no. 6 on 4.5.2021 on erroneous grounds as it had the effect of adversely affecting the sanctity of elections and its result.

It is a case where votes cast and counted in respect of Booth Nos. 120, 121, 134,138 and 150 which were part of Ward No. 28, were not included in the final tabulation of votes in Form 50 pertaining to the said ward, instead, they were erroneously mentioned in Form-50 pertaining to Ward No. 29. There is no denial of this fact by the petitioners in the pleadings. Likewise, votes polled and counted in respect of Booth No. 100 of Ward No. 29 were erroneously included in Form-50 pertaining to Ward No. 28. It is this error which has been rectified by the impugned action. Based on this exercise the opposite party no. 6 has been declared elected and has taken oath and the certificate of election issued earlier in favour of the petitioner on the basis of incorrect entries in the final tabulation chart has been cancelled.

We confronted learned counsel for the petitioner as to whether he had rebutted the specific finding of fact in the impugned order and specific assertion in para-15 of the counter affidavit of opposite party no. 6 that the booths in question were part of Ward No. 28, but, the votes polled and counted in respect thereof were not included in the final Form-50 pertaining to Ward No. 28, which contains the final result, instead, they were included in Form-50 of Ward No. 29, the learned counsel could not give any satisfactory reply. He stated that he had not been given an opportunity by the concerned official to put his version. When we asked as to why he has not availed the opportunity before this Court as there is documentary proof annexed as C.A.-6 to the counter affidavit of opposite party no. 6 containing the list of booths of the two wards, i.e., ward No. 28 and 29 corroborating the finding of fact in the impugned order and the assertion of the opposite party no. 6, he did not have any reply. We have perused para-20 of the rejoinder affidavit as also other paragraphs therein and have also perused the contents of the writ petition, but we did not find any averment that the aforesaid facts as mentioned in the impugned

order or in the counter affidavit of opposite party no. 6 were incorrect nor any proof to show that it was so. The reply in para-20 of the rejoinder affidavit merely contains a bald denial and is apparently evasive.

The legal position, no doubt, is that ordinarily there would be no interference in an election matter after an election result has been declared, however, we find that on 4.5.2021 itself the petitioner had submitted an application before the A.R.O./R.O. pointing out the error, but, the said officer did not apply his mind to the facts before him. Had he done so, this situation would not have arisen. It is also a question before us that should we ignore an apparent illegality which has not been rebutted by the petitioner in spite of opportunity before us, and thereby should we revive an illegality by interfering with the order on the grounds asserted by the petitioner's counsel. We have to keep in mind that we are exercising equitable discretionary jurisdiction under Article 226 of the Constitution of India and if a fact is apparent and the impugned order has done substantial justice in the matter by rectifying the error, which is apparent and remains unrebutted, then, the High Court under Article 226 of the Constitution of India would not interfere, as, in doing so it would revive another illegality. We are of the considered opinion that purely on facts we are not inclined to interfere with the impugned order as it rectifies an apparent and unrebutted error. Secondly because in doing so we would be reviving an illegality, one which is far more grave than the one being alleged by the petitioner, as, it has the effect of compromising the fairness and sanctity of the election process. Had it been an arguable and triable case based on the averments made on behalf of the petitioner and the arguments advanced, then, we may have interfered in the matter, but, when the facts go undisputed, then the result is irresistible and it has to be in favour of substantial justice which has been rendered by the impugned order.

In taking this view we are supported by the decision of Hon'ble the Supreme Court reported in **(1994) 2 SCC 481, State of Maharashtra & ors. v, Prabhu**, wherein while noticing the distinction between writs issued as a matter of right such as *habeas corpus* and those issued in exercise of discretion such as *certiorari* and *mandamus* it was held that where the Government or any authority passes an order which is contrary to Rules or law, it becomes amenable to correction by the Courts in exercise of writ jurisdiction, but, one of the principles inherent in it is that the exercise of power should be for the sake of justice. One of the yardstick for it is if the quashing of the order results in greater harm to the society, then the Court may restrain from exercising the power. Similar view has been taken

in other decisions of the Supreme Court, such as, in the case of ***A.M. Allison and H.B. Brig v. B.L. Sen & ors., AIR 1957 SC 227***. It was a case where the order of the Deputy Commissioner Sri Shiv Sagar was alleged to be without jurisdiction, yet the Supreme Court upheld the decision of the High Court in declining to exercise jurisdiction in the matter under Article 226 of the Constitution of India as substantial justice had been done. We may also refer to the decision reported in ***AIR 1966 SC 828, Gadde Venkateshwara Rao v. Government of Andhra Pradesh & ors.***; wherein, Hon'ble the Supreme Court affirmed the decision of the High Court in refusing to exercise its extraordinary discretionary power in the circumstances of the case, as, if the High Court had quashed the said order, it would have restored an illegal order. This decision has been followed in *M.C. Mehta v. Union of India & ors., (1999) 6 SCC 237*. We accordingly decline to exercise our extraordinary discretionary and equitable jurisdiction in the matter and dismiss this writ petition.

(Saurabh Lavania, J.) (Rajan Roy, J.)

Order Date :- 12.8.2021
A.Nigam