

(2006) 3 MPLJ 506

Madhya Pradesh High Court

Case No: Writ Petition No. 823 of 2005

Suresh Choudhary

APPELLANT

Vs

Atarlal Verma and
Others

RESPONDENT

Date of Decision: March 13, 2006

Acts Referred:

- Constitution of India, 1950 - Article 14, 191, 192, 226, 243O
- Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 - Section 122, 36, 36(2), 40, 40(2)

Citation: (2006) 3 MPLJ 506

Hon'ble Judges: Dipak Misra, J

Bench: Single Bench

Advocate: Vivek Rusia, for the Appellant; Rajesh Tiwari, for the Respondent No. 1 and Vinod Mehta, Government Advocate for the Respondent Nos. 3 to 6, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Dipak Misra, J.

The centroidal issue that emerges for consideration in this writ petition preferred under Article 226 of the Constitution of India is whether the respondent No. 1 is entitled under law to hold the post of Member of Jila Panchayat, Chhindwara though he was elected in the election held in December, 2004 from Ward No. 19 of Jila Panchayat, Chhindwara reserved for Other Backward Classes.

The facts which are requisite to be stated for adjudication of this writ petition are that the petitioner is a resident of Ward No. 7 and his name finds place at Serial No. 407 of the voters list of Gram Markahand which comes under the Zila Panchayat, Chhindwara. The

respondent No. 1 was elected as Sarpanch of Gram Panchayat, Navegaon Makaria in the year 1994. During his tenure the villagers made number of complaints to the Sub-Divisional Officer alleging that he has misappropriated the Government fund. An inquiry was made and a show-cause notice was issued by the Sub-Divisional Officer u/s 40 (b) of the Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (for brevity "the Act"). The charges levelled against him were that he had got sanction of Rs. 10,000/- to each member of his village from Rural Hank but paid only Rs. 1,000/- to each of them and rest of the amount was misappropriated by him. After a detailed inquiry and investigation the Sub-Divisional Officer (bund the charges levelled against the respondent No. 1 had been proved. Because of the aforesaid conclusion the said authority on 22-3-1999 in exercise of powers conferred on him u/s 40 (b) of the Act declared continuance of the respondent No. 1 as Sarpanch of the Gram Panchayat was not in public interest and further a sum of Rs. 33,000/- was liable to be recovered as land revenue. A copy of the order has been brought on record as Annexure P-1. Being dissatisfied with and aggrieved by the aforesaid order the respondent No. 1 preferred an appeal before the Collector which was registered as Appeal No. 20/A-89 (15) 98-99. The Collector did not perceive any merit in the appeal and by order dated 12-10-1999 declined to interfere as per Annexure P-2. The aforesaid orders were allowed to attain finality inasmuch as the respondent No. 1 accepted the same and chose not to assail them in any other forum.

According to the writ petitioner in December, 2000 the election for the session was declared and Ward No. 19 of the Jila Panchayat was reserved for Other Backward Classes. Nomination forms were to be submitted between 22nd December to 28th December, 2004. The respondent No. 1 submitted his nomination form on 24-12-2004 before the Returning Officer along with the affidavit regarding the factum pertaining to any pendency of criminal case as well as outstanding of Government/bank dues. In the nomination form he had not declared his disqualification u/s 40 (b) of the Act as per order dated 22-3-1999 passed by the Sub-Divisional Officer, which had received the stamp of approval by the Appellate Authority. He has also suppressed the factum that he had to pay a sum of Rs. 33,000/- as land revenue by virtue of the aforesaid order. A copy of the nomination form along with the affidavit filed by the respondent No. 1 has been brought on record as Annexure P-3. The respondent No. 1 was allotted the symbol of "bow-arrow". As the essential facts were suppressed the Returning Officer accepted the nomination form and allowed him to contest. The voting was held on 19-1-2005 and the result was declared on 21-1-2005 in which the respondent No. 1 was declared elected securing 11,253 votes whereas one Ratan Verma secured 7857 votes. In this backdrop respondent No. 1 was declared elected. It is contended that the respondent No. 1 was disentitled in law to contest the election and to be elected for six years. It is urged that it was imperative on the part of the respondent No. 1 to state the facts which are essential but he chose to suppress the same as a consequence of which the nomination form was accepted. He has also highlighted that disclosure of such a fact is sine qua non and that having not been done the respondent No. 1 is not eligible to hold the post in question. It is

also urged that the respondent No. 1 is facing criminal charges under Sections 420, 468 and 120-13 in the Court of Judicial Magistrate First Class, Chhindwara and if the said factum would have been disclosed he would not have been allowed to contest the election. It is contended that in law the respondent No. 1 is not entitled to continue in the said post and hence, a writ of quo warranto is to be issued to declare him disqualified to continue in the post to which he has been elected and any other post to which he has been elected and any other post to which he might have been further elected.

A counter-affidavit has been filed by the respondent Nos. 3 and 4, namely, the State of Madhya Pradesh and Collector, Chhindwara contending, inter alia, that the petition filed by the petitioner is not maintainable as he had the remedy to the election petition assailing the election of the respondent No. 1 u/s 122 of the Act and as he has chosen not to do so the present petition is liable to be dismissed. It is also put forth that the respondent No. 1 had submitted the nomination form along with the affidavit but he had not disclosed any order of removal or order of recovery including the disqualification u/s 40 (b) and Section 92 (5). The nomination form and the affidavit filed by the respondent No. 1 was affixed in the notice board of the Returning Officer, Chhindwara and despite the public notice affixed on the board, no objection was filed before the Returning Officer regarding disqualification or removal as well as recovery of the amount. It is asserted that these facts were not made available to the Returning Officer and, therefore, the respondent No. 1 was allowed to contest the election.

A return has been filed by the respondent No. 5, the Chief Executive Officer, Jila Panchayat, Chhindwara stating that the present petition is not maintainable since he had not filed an election petition. It is urged that unsuccessful candidate of the said ward of Jila Panchayat has already filed an election petition before the Commissioner questioning the propriety of the election of the respondent which has been registered as Case No. 23II-B/I24/2004-05. A stand has also been taken that the factum of disqualification was not disclosed in the nomination form and that is why he was allowed to contest the election.

I have heard Mr. Vivek Rusia, learned Counsel for the petitioner and Mr. Rajesh Tiwari, learned Counsel for the respondent No. 1 and Mr. Vinod Mehta, learned Government Advocate for the respondent Nos. 3 to 5.

It is submitted by Mr. Rusia, learned Counsel for the petitioner that the respondent No. 1 having incurred the disqualification to contest election for a period of six years could not have been in a position to fill up the nomination form and the same was within his special knowledge and being statutorily disqualified the election has to be declared as void and further a declaration should be given that the respondent No. 1 was not entitled to participate in the proceeding of Jila Panchayat. The learned Counsel has submitted that if Section 36 of the Act is understood in proper perspective the respondent No. 1 cannot also be allowed to remain in the office as he has incurred disqualification under the said provision inasmuch as he has not paid the dues which are recoverable by the Panchayat

and further not filed the nomination form indicating in the declaration that the money Was due to him. It is also his proponentment that though an election petition can be filed u/s 122 of the Act that does not bar the proceeding to be initiated under Article 226 of the Constitution of India for issuance of a writ of quo warranto if it is manifest and luminescent that a disqualified person has been elected and sits in the Panchayat. Mr. Rusia, has commended me to the decision rendered in the case of [K. Venkatachalam Vs. A Swamickan and Another](#), and [Shaligram Shrivastava Vs. Naresh Singh Patel](#), .

Mr. Rajesh Tiwari, learned Counsel for the respondent No. 1 countering the aforesaid submissions has contended when an election proceeding as has been envisaged u/s 122 of the Act has been initiated, a writ petition of this nature is no entertainable and liable to be dismissed. He has placed reliance on the decision rendered in the case of [Ashok Kumar Rawat Vs. State of M.P. and Others](#), .

Before I proceed to dwell upon the obtaining factual matrix it is thought appropriate to refer to certain provisions of law in the field. Article 243O(b) reads as under :

Article 243-O. Notwithstanding anything in this Constitution,½

(b) 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,

In this regard it is profitable to refer to Section 122 of the Act. It reads as under :

Section 122. Election petition.½ (1) An election under this Act shall be called in question only by a petition presented in the prescribed manner:

(i) in case of Gram Panchayat or Gram Sabha to the Sub-Divisional Officer (Revenue);

(ii) in case of Janpad Panchayat to the Collector; and

(iii) in case of Zila Panchayat to the Divisional Commissioner and not otherwise.

(2) No such petition shall be admitted unless it is presented within thirty days from the date on which the election in question was notified.

(3) Such petition shall be inquired into or disposed of according to such procedures as may be prescribed.

On a reading of the aforesaid provision there cannot be any doubt that an election under this Act can only be called in question by a petition presented in the prescribed manner. In the case of Ashok Kumar Rawat (supra), the learned Single Judge after referring to the case of [State Election Commission, Bhopal Vs. Ras Bihari Raghuwanshi and Others](#), , came to hold that the writ petition is not maintainable in view of the provisions under Article 243O(b) of the Constitution. The learned Single Judge also referred to Article

243O(b) and expressed the view that in view of the non-obstante clause contained in Article 329(b) of the Constitution the power of the High Court to entertain the petition questioning the election under Article 226 of the Constitution is taken away and hence, the writ petition under Article 226 was not maintainable. After so stating the learned Single Judge in Paragraph 15 expressed the view as under :

15. Considering the present case, in the light of the aforesaid. I am of the considered view that the present petition is also not maintainable. The argument of the learned Counsel placing reliance in the case of K. Venkatachalam (supra), is distinguishable in view of the fact that the basic disqualification which was available in that case is lacking in the present case. The present case is not a case where it can be said that the respondent No. 6 lacks the basic qualification as provided for contesting the election. On the contrary the question with regard to the social status of the respondent No. 6 requires determination on the basis of the evidence that may be led by the parties. Accordingly, I have no hesitation in holding that the petitioner has a remedy to approach the Election Tribunal.

On a perusal of the aforesaid pronouncement of law it is perceivable that the learned Single Judge has found in that case that the respondent No. 6 did not lack the basic qualification as provided to contest the election. In that backdrop the learned Single Judge distinguished the case of K. Venkatachalam (supra).

Presently, I shall refer with profit to the law laid down in the case of K. Venkatachalam (supra). In the aforesaid case the Apex Court was dealing with a case where the candidate had incurred the disqualification prior to the election and knew about it. Their Lordships came to hold that a writ petition under Article 226 for declaring that the candidate was not qualified for the Membership was maintainable. Their Lordships in Paragraphs 27 and 28 of the said decision expressed the view as under :

27. In view of the judgment of this Court in the case of [Election Commission, India Vs. Saka Venkata Subba Rao and](#), it may be that action under Article 192 could not be taken as the disqualification which the appellant incurred was prior to his election. Various decisions of this Court which have been referred to by the appellant that jurisdiction of the High Court under Article 226 is barred challenging the election of a returned candidate and which we have noted above do not appear to apply to the case of the appellant now before us. Article 226 of the Constitution can be exercised when there is any act which is against any provision of law or violative of Constitutional provisions and when recourse cannot be had to the provisions of the Act for the appropriate relief. In circumstances like the present one, bar of Article 329(b) will not come into play when case falls under Articles 191 and 193 and whole of the election process is over. Consider the case where the person elected is not a citizen of India. Would the Court allow a foreign citizen to sit and vote in the Legislative Assembly and not exercise jurisdiction under Article 226 of the Constitution ?

We are, therefore, of the view that the High Court rightly exercised its jurisdiction in entertaining the writ petition under Article 226 of the Constitution and declared that the appellant was not entitled to sit in Tamil Nadu Legislature Assembly with consequent restraint order on him from functioning as a member of the Legislative Assembly. The net effect is that the appellant ceases to be a member of the Tamil Nadu Legislative Assembly. Period of Legislative Assembly is long since over. Otherwise we would have directed respondent No. 2, who is Secretary to Tamil Nadu Legislative Assembly, to intimate the Election Commission that Lalgudi Assembly Constituency seat has fallen vacant and for the Election Commission to take necessary steps to hold fresh election from that Assembly Constituency. Normally in a case like the Election Commission should invariably be made a party.

In this context, I may fruitfully refer to the decision rendered in the case of Shaligram Shrivastava (supra), wherein in Paragraphs 10 and 16 it has been held as under :

10. At the time of scrutiny the Returning Officer is entitled to satisfy himself that a candidate is qualified and not disqualified. Sub-section (2) of Section 36 authorises him to hold an enquiry on his own motions, though summary in nature. The Returning Officer furnished a proforma to the candidates to be filled on affidavit and filed on or before the date and time fixed for scrutiny of the nomination paper. Therefore providing a proforma, eliciting necessary and relevant information in the light of Section 8 of the Act to enquire as to whether the person is qualified and not disqualified, is an act or function fully covered under Sub-section (2) of Section 36 of the Act. The Returning Officer is authorized to seek such information to be furnished at the time or before scrutiny. If the candidate fails to furnish such information and also absents himself at the time of the scrutiny of the nomination papers, is obviously avoiding a statutory enquiry being conducted by the Returning Officer under Sub-section (2) of Section 36 of the Act relating to his being not qualified or disqualified in the light of Section 8 of the Act. It is bound to result in defect of a substantial character in the nomination.

* * *

In the case in hand the candidate had failed to furnish such information as sought on the pro forma given to him and had also failed to be present personally or through his representative at the time of scrutiny. The statutory duty/power of Returning Officer for holding proper scrutiny of nomination paper was rendered nugatory. No scrutiny of the nomination paper could be made u/s 36 (2) of the Act in the light of Section 8 of the Act. It certainly rendered the nomination paper suffering from defect of substantial character and the Returning Officer was within his rights in rejecting the same.

In this context, I may usefully refer to the decision rendered in the case of [People's Union for civil Liberties \(PUCL\) and Others Vs. Union of India \(UOI\) and Another](#), wherein the Apex Court expressed the view that a voter has a right to know about the antecedents of the contesting candidate and such a disclosure is necessary for survival of true

democracy. Their Lordships in Paragraph 18 of the judgment ruled thus:

18. So, the foundation of a healthy democracy is to have well-informed citizens-voters. The reason to have right of information with regard to the antecedents of the candidate is that voter can judge and decide in whose favour he should cast his vote. It is voter's discretion whether to vote in favour of an illiterate or literate candidate. It is his choice whether to elect a candidate against who criminal cases for serious or non- serious charges were filed but is acquitted or discharged. He is to consider whether his candidate may or may not have sufficient assets so that he may not be tempted -to indulge in unjustified means for accumulating wealth. For assets or liability, the voter may exercise his discretion in favour of a candidate whose liability is minimum and there are no over-dues of public financial institution or Government dues. From this information, it would be to some extent, easy to verify whether unaccounted money is utilized for contesting election and whether a candidate is contesting election for getting rich or after being elected to what extent he became richer. Exposure to public scrutiny is one of the known means for getting clean and less polluted persons to govern the country. A little man is a citizen is a voter is the master of his vote. He must have necessary information so that he can intelligently decide in favour of a candidate who satisfies his criterion of being elected as MP or MLA. On occasions, it is stated that we are not having such intelligent voters. This is no excuse. This would be belittling a little citizen voter. He himself may be illiterate but still he would have guts to decide in whose favour he should cast his vote. In any case, for having free and fair election and not to convert democracy into a monarchy and mockery or a farce, information to voters is the necessity.

I am conscious the last two pronouncements were made under different circumstances, but I have taken note of the same for appreciation of the factual scenario exposited in the case at hand. In the case of Venkatachalam (supra), Their Lordships gave emphasis on the fact that if any person incurs disqualification in violation of statutory laws he cannot be allowed to sit in the assembly. In the case of Ashok Kumar Rawat (supra), the learned Single Judge distinguished the case of Venkatachalam (supra). The case at hand has a different factual matrix. To appreciate the said distinction, it is condign to refer Section 40 (b) of the Act. It deals with the removal of the office bearers of Panchayat. It stipulates that the Government or the Prescribed Authority may after such inquiry as it may deem fit at any time, remove an office bearer if he is guilty of misconduct in the discharge of his duties or his continuance in the office is undesirable in the interest of the public. Sub-section (2) of Section 40 provides that a person who has been removed under Sub-section (1) shall forthwith cease to be a member of any other Panchayat of which he is a member such person shall also be disqualified for a period of six years to be elected under this Act. As is manifest, the Prescribed Authority had passed an order under the said provision and there is disqualification which has been stated in the order. In the appeal the said order had been affirmed. Clause (cb) to Section 36 which has been inserted by Act No. 16/2004 reads as under :

36. Disqualification for being office bearer of Panchayat. (1) No person shall be eligible to be an office bearer of Panchayat who

(b) has not paid all the dues which are recoverable by Panchayat and has not filed with nomination paper, the declaration of such intention that no money is due to be paid by him on any account payable to the Panchayat; or

Thus, from the aforesaid provisions, it is clear as noon day that a candidate was required to declare about money dues to the Panchayat. The elected candidate was also aware of the fact of his own disqualification. It was within his special knowledge Section 36 deals with disqualification for being office bearer of Panchayat. Sub-section (2) (a) of Section 36 reads as under:

36. (2) If any person having been elected as an office bearer of Panchayat:

(a) subsequently becomes subject to any of the disqualification mentioned in Sub-section (.1) and such disqualification is not removable or being removable, is not removed or becomes office bearer concealing his disqualification for it, which has not been questioned and decided by any election petition u/s 122.

If the aforesaid provision is read in proper perspective there remains no scintilla of doubt that the respondent No. 1 had deliberately not mentioned the factum of disqualification. It is interesting to note that the respondent No. 1 has chosen not to file counter affidavit. Other respondents have categorically and unequivocally stated that respondent No. 1 was proceeded u/s 40 and was removed from the post and disqualification was attached. This was within the special knowledge of respondent No. 1. Despite the same he chose not to disclose the said aspect. There cannot be any doubt that had the said fact been disclosed his nomination paper would not have been accepted. In the absence of any counter affidavit and submissions made by other respondents it is quite vivid that the respondent No. 1 has played fraud on the statute. An election a democratic polity has its sacrosanctity, respondent No. 1 has endeavoured to create a concavity in the same. Such a thing in a democratic set up is not permissible. He is not entitled to hold the office as he was not eligible to contest the election. A person who is not entitled to contest the election and the fact is absolutely tell-tale and clear as day like a shine on the sea-shore and does not require any inquiry, his continuance cannot be accepted. The writ petition would be maintainable as such a person cannot be allowed to participate in a proceeding of Jila Panchayat as a Member and his election has to be declared as illegal. Ergo, a writ of quo warranto would be maintainable and relief can be granted.

Ex consequents, it is clear that the respondent No. 1 is disqualified to hold the office of the Member of the Jila Panchayat and any other consequential post if he has entered into further election. Respondents are directed to hold a fresh election for the said Ward of the Jila Panchayat in respect of which the respondent was elected. The said exercise shall be completed as expeditiously as possible.

Resultantly the writ petition is allowed without any order as to costs.