

(2007) 07 PAT CK 0069

Patna High Court

Case No: None

Rameshwar Prasad
Yadav

APPELLANT

Vs

Awadhesh Kumar
Singh

RESPONDENT

Date of Decision: July 3, 2007

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

S.N. Hussain, J.

This petition has been filed by the sole petitioner, namely, Shri Rameshwar Prasad Yadav, under the provisions of Section 80 and 80-A of the Representation of People Act, 1951 (hereinafter referred to as "the Act" for the sake of brevity) calling in question the election of the returned candidate, namely, Shri Awadhesh Kumar Singh (sole respondent) as a Member of the Legislative Assembly from 231 Gaya Muffasil Assembly Constituency, which was held in October, 2005,

2. The facts of this case are that the Additional Collector, Gaya, who was appointed as Returning Officer of the election in question, issued a notification on 23-9-2005 with respect to the detailed programme of the Assembly election in 231 Gaya-Muffasil Assembly Constituency. The last date for filing of nomination paper was 30-9-2005 and altogether seventeen candidates filed their nomination papers before the Returning Officer by 30-9-2005 fixed for filing the nomination papers of the said candidates. The sole petitioner was the official candidate of Janta Dal (United) political party, whereas, the sole respondent was the official candidate of the Indian National Congress political party. Along with his nomination papers, the petitioner had attached a notice in Form B regarding the symbol allotment order issued by the authorised person of Janta Dal (United) political party to show that he was the official candidate of the said political party. Another candidate, namely, Shri Binod Kumar Yadvendu also filed his nomination papers before the Returning

Officer as the official candidate of Janta Dal (United) political party along with a notice in Form B regarding another symbol allotment order issued by the authorised person of the same political party, but this symbol allotment order was passed without cancelling the earlier symbol allotment order issued in favour of the petitioner.

3. The nomination papers of all the candidates were scrutinized on 1-10-2005 by the Returning Officer in presence of the candidates or their respective representatives, in which the petitioner's nomination paper was accepted as an official candidate of Janta Dal (United) political party and an order to that effect was recorded by the Returning Officer on the nomination paper itself, but the nomination paper of Shri Binod Kumar Yadvendu claiming to be an official candidate of Janta Dal (United) political party was rejected as symbol allotment order in his favour and the filing of the nomination paper by him were subsequent to those of the petitioner. This decision was communicated to Shri Binod Kumar Yadvendu by the Returning Officer vide letter dated 1-2-2005 (Annexure 1), whereafter the Returning Officer returned the list of 16 validly nominated candidates in Form-4 as provided under Sub-section (8) of Section 36 of the Act read with Rule 8 of the Conduct of Election Rules, 1961 (hereinafter referred to as "the Rules" for the sake of brevity) as none of the validly nominated candidates had withdrawn his candidature till the final date for withdrawal, which was fixed on 3-10-2005.

4. However, the Returning Officer sent letter No. 59 dated 3-10-2005 (Annexure 2) to the petitioner directing him to be present in his chambers at 2.30 P. M. on the same date for the purposes of rescrutiny of nomination papers of the election petitioner and the aforesaid Shri Binod Kumar Yadvendu as per direction of Legal Advisor of Election Commission of India. On the said date and time, the petitioner appeared before the Returning Officer and raised only question of law as the facts of the case were all admitted and submitted that since the Act and also the Rules did not confer any power of review upon the Returning Officer and when the nomination paper of the election petitioner had already been accepted; and that of Shri Binod Kumar Yadvendu had already been rejected on the date of scrutiny, there was no scope of re-scrutiny of nomination papers and no order of review could have legally been passed, as any order reviewing the earlier order already passed on scrutiny would be illegal and contrary to the provisions of law.

5. However, the Returning Officer rejected the nomination paper of the petitioner, which was earlier accepted and accepted the nomination paper of Shri Binod Kurhar Yadvendu, which was earlier rejected and an order to that effect was recorded on the nomination paper dated 3-10-2005 (Annexure 3). Immediately thereafter the petitioner challenged the said order dated 3-10-2005 in this Court vide C. W. J. C. No. 13095 of 2005 and on 19-10-2005 this Court directed the Election Commission to file its counter-affidavit and notices were directed to be issued to said Shri Binod Kumar Yadvendu and the matter was referred to a Division Bench, but the same is still

pending for disposal.

6. The petitioner also sent a representation on 4-10-2005 (Annexure 4) to the Chief Election Commissioner, Election Commission of India, New Delhi, as well as to the Observer of 231, Gaya Muffasil Assembly Constituency and also to the State Election Commission, Bihar, Patna, through Fax, but no action was taken in that regard by any of the said authorities and as per schedule, polling was held on 21-10-2005 whereafter on the same date the respondent, who had obtained highest number of votes, was declared elected and immediately thereafter the instant election petition was filed by the petitioner on 29-11-2005.

7. The claim of the learned Counsel for the sole petitioner is that notice in Form B regarding allotment of symbol to the petitioner was issued on 29-9-2005 (Ext. 2) by the authorised person of Janta Dal (United) political party, making the petitioner official nominee of the party, but subsequently another similar notice was issued on 30-9-2005 (Ext. 4) in favour of another candidate, namely, Binod Kumar Yadvendu without cancelling or even mentioning about the earlier symbol allotment order in favour of the petitioner. He referred Clause 13(b),(c) as well as Clause 13-A of the Election Symbols (Reservation) and Allotment Order, 1968 (hereinafter referred to as "the Order" for the sake of brevity) with respect to the substitution of the candidates in which it has been prescribed that it cannot be done unless the earlier allotment was rescinded, but there was no mention in Form B-of Shri Binod Kumar Yadvendu that the symbol of the petitioner allotted earlier was rescinded. Hence, he submitted that the order of the Returning Officer dated 1-10-2005 passed at the time of scrutiny was completely in accordance with the provisions of law as well as the instructions given in the Hand Book prescribed for the Returning Officer for holding election, out of which Chapter VI specifically deals with the scrutiny of nomination paper.

8. The petitioner's learned Counsel further submitted that the petitioner had also filed his nomination papers before the Returning Officer at 1.20 P. M. on 30-9-2005, whereas, said Shri Binod Kumar Yadvendu filed his nomination papers later before the same authority at 2.05 P. M. on the same date and hence at the time of final scrutiny of the nomination papers on 1-10-2005; the Returning Officer rightly accepted the nomination paper of the petitioner and rejected the nomination paper of Shri Binod Kumar Yadvendu as the official candidate of Janta Dal (United) political party, whereafter, even a list of validly nominated candidates as provided under Sub-section (8) of Section 36 of the Act, read with rule 8 of the Rules, was prepared by the Returning Officer, in which name of election petitioner was mentioned as the official candidate of Janta Dal (United) political party and was pasted on the Notice Board of the office of Returning Officer for general information. Hence, he submits that after the final scrutiny and publication of the list of validly nominated candidates, there was no scope of any further scrutiny as the word "re-scrutiny" is unknown to the provisions of the Act or the Rules as is clear from the provision of

Section 38 of the Act, specially Sub-section (8) thereof.

9. Learned Counsel also averred that the order sheet of the Returning Officer clearly shows that after the completion of the continuous process of scrutiny on 1-10-2005, all the concerned persons were informed by the authorities about the rejection of the nomination paper of Shri Binod Kumar Yadvendu on 2-10-2005, hence when the nomination paper of the petitioner had already been accepted and the nomination paper of Shri Binod Kumar Yadvendu had been rejected on the date of final scrutiny, there was no scope of any re-scrutiny of nomination paper as any order passed contrary to the order already passed earlier, would amount to illegally reviewing the matter although the Returning Officer had no power of such review.

10. It is the further case of the petitioner that in the aforesaid circumstances, the said order of the Returning Officer dated 3-10-2005 was clearly illegal and contrary to the provisions of law and was passed merely due to the fear of the Legal Advisor of the Election Commission of India, who had issued directions on telephone to the Returning Officer on the complaint of the wife of Shri Binod Kumar Yadvendu. Learned Counsel for the petitioner also claimed that the decision taken by the Returning Officer at the time of scrutiny of nomination paper is a final order as per the quasi judicial function of the Returning Officer and hence he had no authority to alter his own final decision and the provisions of law also do not envisage such power in the Returning Officer. In the said circumstances, rejecting the earlier accepted nomination paper of the petitioner and accepting the earlier rejected nomination of Shri Binod Kumar Yadvendu was completely alien to any provision of law concerned and, thus, was illegal, arbitrary and without jurisdiction. It was also claimed by the petitioner that such an order can be challenged only by way of filing an election petition as provided u/s 80 A of the Act and that too after the election process was over and hence the petitioner could not do anything in that regard nor he could take part in the election although he had overwhelming support of the electorates of the constituency concerned, whereas, said Shri Binod Kumar Yadvendu took part and lost the election.

11. On the other hand, specific claim of the sole respondent is that D. O. letter dated 30-9-2005 (Ext.- "A") clearly shows that the candidature of the petitioner was rescinded in clear terms, it was further averred by learned Counsel for the respondent that the entire allegation is against the other candidate, namely, Shri Binod Kumar Yadvendu but he has not been impleaded in the election petition and hence this election petition is not maintainable. It was also claimed that the Symbol Allotment Order; 1968, is not binding as the provisions of the Act and furthermore Clause 8 of the said Order defines the power of the Election Commission, which is all pervasive and vast power can be imbibed. Learned Counsel for the respondent pointed out that order dated 3-10-2005 was the final order with respect to scrutiny of nomination paper as per the order of the Election Commission, whereafter, the list of contesting candidates was finally published in Form 7-A as neither any final

scrutiny was made nor any final list was published earlier, which is clear from the order sheet of the Returning Officer (Ext. 8). It was also stated on behalf of the respondents that the Returning Officer himself specifically proved the aforesaid facts in his deposition as D. W. 2.

12. Considering the aforesaid facts and circumstances of the case as well as the pleadings of the parties, the following issues were framed for disposal of this election petition:

(i) Whether the election petition as framed is maintainable ?

(ii) Whether non-compliance of mandatory provisions of Sections 81, 82 and 117 of the Representation of People Act, 1951 vitiates the petition under the provision of Section 86(1) of the Act?

(iii) Whether the petitioner has disclosed cause of action and material facts and necessary particulars as required u/s 83 of the Act ?

(iv) Whether the petitioner has any valid cause of action to challenge the election of the sole respondent as the direction/ order of Election Commission of India contained in Annexure-A to the written statement is binding upon the Returning Officer ?

(v) Whether the nomination paper filed by the petitioner was improperly rejected by the Returning Officer ?

(vi) Whether the Returning Officer had the authority under the law to reject the nomination paper of the petitioner after being accepted as valid on the date of scrutiny and to accept the nomination paper of Binod Kumar Yadvendu which was earlier rejected by him on the date of scrutiny ?

(viii) Whether the Returning Officer is authorised under the Representation of People Act, 1951 to review his own order?

(viii) Whether the election of the sole respondent is fit to be set aside on the ground that the nomination paper was improperly rejected ?

13. The sole respondent filed an interlocutory application bearing I. A. No. 4662 of 2006 for dismissing the election petition on the preliminary issue of non-maintainability of the election petition under the provision of Section 86(1) of the Act. However, after hearing the parties the said interlocutory application was dismissed by this Court on 5-12-2006 holding that the issues of maintainability as well as non-compliance of mandatory provisions of the Act have already been framed for being decided at the time of final hearing of the election petition and the respondent would be at liberty to press those issues along with other issues at that stages.

14. The sole petitioner himself deposed as P. W. 1 and supported the claim raised by him in his election petition. Not other witness deposed in his favour. However, for the sole respondent, two witnesses deposed and both of them were official witnesses, out of whom D. W. 1 was the Chief Electoral Officer, whereas, D. W. 2 was the Returning Officer of the election in question.

15. So far documentary evidence produced by the petitioner is concerned, Ext. 1 series are the nomination papers of the petitioner, which were submitted before the Returning Officer, whereas, Ext. 2 is a letter of the Chairman, Parliamentary Board of the Janta Dal (United) political party allotting the party symbol to the petitioner. Ext. 3 series are the nomination papers of other candidate, namely, Shri Binod Kumar Yadvendu submitted before the Returning Officer, whereas, Ext. 4 is the letter of the Chairman of the Parliamentary Board of Janta Dal (United) allotting party symbol to said Shri Binod Kumar Yadvendu. Ext. 5 is letter No. 53 dated 1-10-2005, issued by the Returning Officer, whereas, letter of the petitioner sent to the State Election Commission, Patna, is marked "X" for identification. The documentary evidence produced by the respondent includes Ext. A, which is D. O. letter dated 30-9-2005 issued by Shri Sharad Yadav, Chairman, Janta Dal (United) Party Parliamentary Board issued in favour of Shri Binod Kumar Yadvendu, whereas, Ext. "B" is the order dated 3-10-2005 passed by the Secretary, Election Commission of India. Ext. "C" is the order of the Returning Officer dated 3-10-2005, whereas, Ext. "D" is the order-sheet of the Returning Officer.

16. Issue No. IV:-Issue No. IV is with respect to order of the Election Commission of India dated 3-10-2005 contained in Ext. "B" as to whether it is legal and binding upon the Returning Officer. As per Article 324 of the Constitution of India, the entire power of superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all the elections to Parliament and to the Legislature of every State, is vested in the Election Commission, whereas, the term "Election Commission" is defined u/s 2(d) of the Representation of the People Act, 1950 as well as in Clause 2(b) of the said Order. Furthermore, Clause 18 of the said Order gives all pervasive and vast power to "the Commission for clarification of any of the provisions of the said Order : for the removal of any difficulty, which may arise in relation to the implementation of such provisions; and for passing any order in relation to any matter with respect to the reservation and allotment of symbols and recognition of political parties, for which no provision or insufficient provision is made in the said Order for the smooth and orderly conduct of elections.

17. Section 30 of the Act provides that as soon as the notification calling upon a constituency to elect a member or members is issued, the Election Commission shall, by notification in the Official Gazette, appoint the dates for filing nominations by the candidates, scrutiny of nominations, withdrawal of the candidatures, the date of poll and the date before which the election is to be completed. Sections 31, 32 and 33 of the Act make provisions of public notice of election, nomination of

candidates for election and presentation of nomination paper as well as requirements for a valid nomination. Sections 35 and 36 of the Act provide for notice with respect to time and place for scrutiny of nominations as well as the procedure for scrutiny of nominations. Section 37 of the Act provides for withdrawal of the candidature, whereas, Section 38 of the Act makes a provision for publication of list of the contesting candidates. But Section 28-A of the Act provides that the Returning Officer, Assistant Returning Officer, Presiding Officer, Polling Officer and any other officer appointed for the purpose shall be deemed to be on deputation to the Election Commission from the date of notification of the election till the date of declaration of the results of such elections, subject to the control, superintendence and discipline of the Election Commission. In the said circumstances, it is held that the direction/order of the Election Commission of India dated 3-10-2005 (Ext. "B") in accordance with the provisions of law is binding upon the Returning Officer.

18. Issue Nos. V, VI, VII and VIII:-These four issues are being taken up together for the sake of convenience as they all are with respect to various aspects of the question relating to rejection of the petitioner's nomination paper after being accepted as well as acceptance of nomination paper of Shri Binod Kumar Yadvendu after being earlier rejected on the date of scrutiny by way of review/re-scrutiny. Although the date for scrutiny of the nomination papers was fixed on 1-10-2005 and on that day petitioner's nomination paper was accepted as an official candidates of Janta Dal (United) political party, whereas, nomination paper of Shri Binod Kumar Yadvendu was rejected, but from the order sheet of the Returning Officer (Ext. "D") as well as from the nomination papers of the petitioner and Shri Binod Kumar Yadvendu (Ext. 1 series and 3 series) both submitted on the same day i.e. 30-9-2005 and both contained the notices in Form-B of the same date regarding symbol allotment order issued by the authorities of the same political party Janta Dal (United), it clearly transpired that the said scrutiny was neither final, nor any final list of validly nominated candidates was prepared under Rule 8 of the Rules, nor any list of the contesting candidates in Form-7-A of the said Rules was published on its basis, nor any list was affixed to the Notice Board in the office of the Returning Officer as per the provision of Sub-section (8) of Section 36 of the Act. Furthermore, from order sheet dated 2-10-2005, it is quite apparent that due to leave /vacation no step was taken on the basis of order dated 1-10-2005.

19. Exts. 1 series and 3 series are the nomination papers of the petitioner and Shri Binod Kumar Yadvendu, whereas, Exts. 2 and 4 are the letters of the authorities of Janta Dal (United) political party allotting party symbol to the petitioner and Shri Binod Kumar Yadvendu, respectively, which are of the same date. Ext. 5 is the letter dated 1-10-2005 issued by the Returning Officer, whereas, the letter of the petitioner sent to the State Election Commission is marked "X" for identification, but none of these exhibits could show that the order of scrutiny dated 1 -10-2005 was final nor the petitioner, except himself, has produced any other witness in support thereof. Exhibit A is D. O. letter dated 30-9-2005 issued by the Chairman of the Janta

Dal (United) Party Parliamentary Board, by which the candidature of the petitioner as the nominee of that party was rescinded in clear terms and Shri Binod Kumar Yadvendu was nominated as the candidate of that party. Ext. B is the order of the Election Commission passed on receipt of a complaint in that regard and also on the basis of the aforesaid D. O. letter dated 30th of September, 2005 (Ext. A), directing the Returning Officer in exercise of powers conferred to the Commission by Article 324 of the Constitution of India to conduct re-scrutiny of both the aforesaid nomination papers at 2.30 P. M. on 3-10-2005 after giving notice to both the aforesaid persons, whether, final order should be passed by the Returning Officer and final list of contesting candidates should be prepared in Form 7-A of the Rules. The said order of the Election Commission has neither been challenged by the petitioner in this case nor any illegality is found in the said order.

20. The respective claims of the parties clearly show that the petitioner was neither official candidate of Janta Dal (United) political party nor that Party wanted him to contest the election on its symbol. Furthermore, except Ext. 2, which was an earlier letter, no evidence either oral or documentary was produced by the petitioner to show that the said political party or its office bearers wanted him to be the candidate of that Party, whereas, there is sufficient materials including Ext. 4, Ext. B, Ext. C and Ext. D, apart from the statements of the Chief Electoral Officer (D. W. 1) and the Returning Officer (D. W. 2), who were independent witnesses, which proved that the said party wanted Shri Binod Kumar Yadvendu to contest the election on its symbol.

21. In view of the aforesaid facts and circumstances there is no difficulty in holding that the order of the Election Commission dated 3-10-2005 (Ext. B) was legal, proper and binding and had to be followed by the Returning Officer and hence the Returning Officer was fully justified in passing the impugned order dated 3-10-2005 (Ext. C). Furthermore, the said impugned order dated 3-10-2005 (Ext. C) of the Returning Officer was clearly not an order of review of his earlier order dated 1-10-2005, rather it was merely final scrutiny of the nomination paper in view of the order of the Election Commission of India and the materials on record.

22. So far legal aspect of the aforesaid correction made with respect to nomination of a candidate of a political party by the Returning Officer is concerned, it may be stated that it has been specifically held by the Hon"ble Apex Court in case of [The State of Punjab and Another Vs. Shamlal Murari and Another](#), that it should be remembered that processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. It has also been observed that procedural prescriptions are the hand-maid and not the mistress, a lubricant not a resistant in the administration of justice. Even if there is a breach of the rule, but it was for correcting an injury for just disposal, regulatory requirement should not be allowed to be enthroned into a dominant desideratum. The Courts are to do justice, not to wreck this end product on technicalities. In another decision in the case of [Shiv](#)

[Chand Vs. Ujagar Singh and Another](#), the Hon"ble Apex Court has held that the substance of the matter must govern because hyper-technicality, when the public policy of the statute is fulfilled, cannot be permitted to play the procedural tyrant to defeat a vital judicial process, namely, investigation into the merits of the election petition. In a case with respect to the Act and the powers of the High Court in respect thereto, the Hon"ble Apex Court in the case of [Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya](#), has held that the procedure is something designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it.

23. Apart from the aforesaid views and decisions of the Hon"ble Supreme Court, the provisions of law are also clear as Article 324 of the Constitution of India gives sufficient-power and authority to the Election Commission for the Superintendence, direction and control of the entire election process, whereas, Clause 18 of the Order also defines the power of the Commission with respect to issuance of instructions and directions in relation to any matter with respect to the reservation and allotment of symbols and recognition of political parties, for which this Order makes no provision or makes insufficient provision, and such direction is in the opinion of the Commission necessary for the smooth and orderly conduct of the elections. Hence, as per the aforesaid provisions, all the difficulties in this regard can be removed by the Election Commission which has imbibed vast and all pervasive power in that regard.

24. Hence, no fault or illegality can be attributed to the Election Commission or the Returning Officer, who acted according to the final decision regarding nomination taken by that political party. Initially scrutiny was done by the Returning Officer on 1-10-2005, but in furtherance thereof no steps could be taken by him as the next date i.e. 2-10-2005 was a holiday and no final list was published and on 3-10-2005 the impugned order was passed as would be clear from the order-sheet of the Returning Officer (Ext. D). In the said circumstances, the Returning Officer was quite justified in making final scrutiny of the nomination papers of the petitioner and Shri Binod Kumar Yadvendu in the light of the order of the Election Commission as well as the final decision of the political party with respect to nomination of its candidates. Only thereafter the matter could be said to have been finalised and final list of the contesting candidates in Form 7-A was published, according to which, the election was held and the election was concluded.

In the said circumstances, it is held that there was no question of review in the instant matter nor the Returning Officer had exceeded in its authority or jurisdiction provided under the law to finally, reject the nomination paper of the petitioner nor

any illegality was committed by the Returning Officer in rejecting the nomination paper of the petitioner by impugned order dated 3-10-2005 (Ext.C), which appears to be legal and proper, requiring no interference.

25. Issue Nos. I, II and III:-These issues are with respect to the questions of maintainability of the election petition, compliance of the mandatory provisions of Sections 81, 82 and 107 of the Act and violation of the provisions of Sections 96(1) and 83 of the Act. Section 81 of the Act provides for presentation of petition on one or more of the grounds specified in Sections 100(1) and 101 of the Act. by any candidate or any elector, whereas, Section 82(ta) provides that a petitioner shall join as respondent to his petition the returned candidate and any other candidate against whom allegations of any corrupt practice are made in the petition. Section 83 of the Act provides that the Election Petition shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice.

26. It is apparent from the pleadings and evidence of the petitioner that he has no grievance against the respondent, who was the candidate of another political party, namely, Indian National Congress nor any corrupt practice has been alleged against him, rather the allegation is against Shri Binod Kumar Yadvendu, a candidate of Janta Dal (United) political party and against the Returning Officer, who had accepted the nomination papers of Shri Yadvendu and rejected the nomination papers of the petitioner with respect to the said political party. In the said circumstances, the grievance of the petitioner is clearly against said Shri Binod Kumar Yadvendu, but he had not joined Shri Binod Kumar Yadvendu as a respondent to this election petition. Furthermore, the general allegation of corrupt practice has been made against said Shri Binod Kumar Yadvendu, but neither full particulars of the corrupt practice have been set forth by the petitioner nor any affidavit in the prescribed form has been made an accompaniment to the election petition. In the said circumstances, the election petition does not comply with the specific mandatory provisions of Sections 83 and specifically Section 82 (b) of the Act and hence this petition is fit to be dismissed under the provision of Section 86(1) of the Act.

27. In view of the aforesaid findings on the issues involved, there appears to be no merit in this election petition and it is, accordingly, dismissed.