

(2012) 12 CAL CK 0004

Calcutta High Court

Case No: C.O. No. 77 of 2011

Shri Bireswar Bhattacharjee

APPELLANT

Vs

Giridhari Sarkar and Others

RESPONDENT

Date of Decision: Dec. 19, 2012**Acts Referred:**

- Constitution of India, 1950 - Article 227
- West Bengal Panchayat Act, 1973 - Section 204

Hon'ble Judges: Prasenjit Mandal, J**Bench:** Single Bench**Advocate:** Milan Ch. Bhattacharya, for the Appellant; Sabyasachi Bhattacharya, for the Respondent**Final Decision:** Dismissed

Judgement

Prasenjit Mandal, J.

This application is at the instance of the opposite party and is directed against the Order No. 36 dated December 23, 2010 passed by the learned Civil Judge (Junior Division), in Misc. (Elections) Case No. 07 of 2008. The opposite party/petitioner herein was the successful candidate in the last Panchayat General Election held in 2008 as a candidate of Dinhata Village-II Gram Panchayat. The opposite party No. 1 herein filed an application u/s 204 of the West Bengal Panchayat Act, 1973 for cancellation of the result of the said Gram Panchayat Election and also for declaration that the opposite party No. 1 herein be declared as winner. That application was converted into the misc. case being Misc. (Elections) Case No. 07 of 2008 before the learned Civil Judge (Junior Division), Dinhata.

2. The petitioner herein contested the said case denying material allegations raised in the election petition. It is his specific case that the process of counting and then toss in the case of tie had been done in presence of both the parties and at that time, no objection was raised by the opposite party No. 1. So, the application is

misconceived and not maintainable. The application should, therefore, be dismissed.

3. By the impugned order, the learned Judge has allowed the application declaring the opposite party No. 1 as elected.

4. Being aggrieved by that order, this application has been preferred.

5. Now, the question is whether the impugned order should be sustained.

6. Upon hearing the learned Counsel for the parties and on going through the materials-on-record, I find that the learned Trial Judge has dealt with the said misc. case on the basis of the evidence adduced by both the parties in support of their contentions. In order to search for the truth in the matter, a Commissioner was appointed and he counted and thoroughly checked the ballot papers and then he submitted a report. On the basis of the report and other materials-on-record, the learned Trial Judge allowed the said misc. case declaring the opposite party No. 1 as winner of the case.

7. So far as the fact of the above matter is concerned, Mr. Milan Ch. Bhattacharya, learned Senior Advocate appearing for the petitioners, did not argue on the findings arrived at by the learned Trial Judge. He has argued as to the maintainability of the said election application. On perusal of the impugned order and the records as a whole, it does not appear that the question of maintainability was ever raised on the points as mentioned before this Bench in the Court of the learned Trial Judge.

8. Mr. Bhattacharya has contended that the learned Trial Judge has dealt with the said application as one u/s 204 of the West Bengal Panchayat Act, 1973, but, the said Section has been amended in the year 2003 and a new procedure has been adopted and the application should be one under the provisions of Section 79 of the Act of 2003 and an amount of Rs. 50/- is to be deposited. So, unless and until the Section 79 is not complied with, the learned Trial Judge is not competent to invoke the jurisdiction of the Court. In support of his case, Mr. Bhattacharya has referred to the decision of Naziram's case reported in 1936 Privy Council 253.

9. He has also referred to the case of [Chainbanu Khatun and Others Vs. State of West Bengal and Others](#), and thus, he has submitted that when a statutory authority is required to do a thing in a particular manner under the statute then the same should be done in that manner alone. This decision is also based on the decision of [Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. and Others](#), referred to by Mr. Bhattacharya.

10. Mr. Bhattacharya has also referred to the decision of [S.D. Joshi and Others Vs. High Court of Judicature at Bombay and Others](#), Supreme Court Cases 252 particularly the Paragraph Nos. 29 to 31 as to the forum where the grievance of the opposite party No. 1 was to be ventilated, i.e., whether before a Judge or a Tribunal.

11. Mr. Bhattacharya has also referred to the case of [Ramchandra Keshav Adke \(Dead\) by Lrs. and Others Vs. Govind Joti Chavare and Others](#), Supreme Court 915 particularly the Paragraph Nos. 14 & 25 and thus, he has submitted that the mandatory provisions as provided in the Act are to be complied with totally and this is to be treated as mandatory and not directory. Therefore, after the amendment of the concerned Act in view of the provisions of Section 79 of the Act of 2003, there is no scope to entertain the application.

12. Mr. Bhattacharya has also contended that in entertaining an application under Article 227 of the Constitution, an agreed party is entitled to invoke the power of superintendence of the High Court in case where gross failure of justice has occasioned or there is a patent error in the impugned order. He has relied on the decision of [Surya Dev Rai Vs. Ram Chander Rai and Others](#), particularly the paragraph nos. 23 & 38.

13. He has also referred to the decision of The [Hooghly Mills Company Limited and Another Vs. Regional Provident Fund Commissioner and Another](#), and thus, he has submitted that a pure question of law can be raised for the first time before any forum even before the Hon"ble Supreme Court provided further adjudication of the disputed facts is not required and thus, Mr. Bhattacharya has submitted that this Court is empowered to decide the question of maintainability of the misc. case in exercising the jurisdiction under Article 227 of the Constitution of India.

14. On the other hand Mr. Sabyasachi Bhattacharya, learned Advocate appearing for the opposite party No. 1, has contended that the question of payment as referred to Mr. M.C. Bhattacharya has been complied with and the balance amount had been deposited with, but, no appeal has been filed. If there is any grievance with regard to the procedure that has to be rectified by appropriate steps within 30 days, but, the petitioner herein did not do so and as such, the question of non-compliance does not arise at all. In deciding a matter, the nomenclature is not the main fact but the main dispute in issue is to be considered.

15. Thus, having heard the learned Advocates of both the sides and on perusal of the materials-on-record, I find that Mr. M.C. Bhattacharya, learned Senior Advocate for the petitioner, did not make any submission as to the merit of the application. The impugned order does not indicate that any such point of maintainability was raised before the learned Trial Judge. The learned Trial Judge has discussed the evidence on record in details in the impugned order and thereafter, he has arrived at a conclusion which does not appear to be perverse at all.

16. This being the position, in exercising the jurisdiction under Article 227 of the Constitution of India in view of the decision of [Shalini Shyam Shetty and Another Vs. Rajendra Shankar Patil](#), under Article 227, orders of the Court and Tribunal can be examined only in very exceptional cases when manifest miscarriage of justice has been occasioned. Such power is not to be exercised to correct a mistake of fact or of

law. In the said decision, the case of Surya Dev Rai (Supra) was taken into consideration. The correctness of the ratio of that decision on issuance of a Writ of Certiorari was doubted.

17. Therefore, I am of the view that it would be appropriate to consider whether the learned Trial Judge has addressed the issue properly or not. On perusal of the materials on record, I find that the petition filed by the petitioner herein was treated as one u/s 79 of the West Bengal Panchayat Election Act, 2003 and as such, the defect as pointed out by Mr. Bhattacharya has been cured subsequently. So, this ground on nomenclature cannot exist now. As I have held that the findings of the learned Trial Judge do not suffer from perversity at all, in my view, there is no scope of interference with the impugned order.

18. Accordingly, I am of the view that this application is bereft of merits and as such, there is no scope of interference.

19. The application is, therefore, dismissed.

20. Considering the circumstances, there will be no order as to costs. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.