

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present :- Hon'ble Justice Amrita Sinha

WPA 18556 of 2023

Kashmira Khan

Vs.

The West Bengal State Election Commission & Ors.

For the writ petitioner	:-	Mr. Sandipan Pal, Adv. Ms. Tithi Chakraborty, Adv.
For the respondent no. 9	:-	Mr. Pratip Kumar Chatterjee, Adv. Mr. Kuntal Ray, Adv.
For the State	:-	Mr. Sirsanya Bandhopadhyay, Adv.
For the WBSEC	:-	Ms. Sonal Sinha, Adv. Ms. Srabasti Barai, Adv.
Heard on	:-	21.03.2024
Judgment on	:-	12.04.2024

Amrita Sinha, J.:-

The petitioner contested the Panchayat General Elections, 2023. On the allegation of merciless beating, snatching and looting of ballot papers in the midst of counting of votes at the instance of the supporters of the ruling dispensation, a complaint was lodged before the State Election Commission and the Panchayat Returning Officer. As the said complaint was not considered by the respondent authorities, she filed a writ petition before this Court being WPA 16653 of 2023. The said writ petition was disposed of on 14th July, 2023 directing the State Election Commission to enquire into the

matter and take necessary remedial steps if the allegations of the petitioner are found to be true.

The State Election Commission enquired the matter and passed reasoned order on 24th July, 2023 which is impugned in the instant writ petition.

The Commission admits the allegation made by the petitioner. It mentions that the Commission conducted an enquiry through the Police and a report had been submitted to the Commission through the District Magistrate, Howrah. The District Magistrate reported that an incident of snatching of ballot papers took place on 11th July, 2023 at Table no. 1, Hall 12 of the counting venue. The report of the Sub-Divisional Officer, Howrah being the Panchayat Returning Officer and the Block Development Officer, Sankrail mentions that an Assistant Panchayat Returning Officer was in charge of the counting hall no. 12. The Observer instructed the counting officer not to proceed further with the counting but the counting officer issued Form 24 in contravention of the instruction of the Observer.

Noticing that the margin of difference of the first and the second candidate is less than the lost ballots, the Panchayat Returning Officer and the Block Development Officer requested permission of the State Election Commission for cancellation of the certificate given in Form 24. The State Election Commissioner has opined that the counting officer completed the counting defying the verbal instruction given by the Panchayat Returning

Officer and the Block Development Officer and handed over the winning certificate to the respondent no. 10, Saima Jamadar.

The State Election Commissioner concluded that as the winning certificate had already been issued, accordingly, the legal remedy of the petitioner lies in filing an election petition under Section 79 of the West Bengal Panchayat Elections Act, 2003, hereinafter referred to as the 'said Act'.

In the same breadth, the State Election Commissioner observed that non compliance of the order of the Panchayat Returning Officer will have to be probed into and appropriate action is to be taken. The District Magistrate has been directed to probe and take appropriate action and to report to the Commission the action taken within a period of fifteen days from the communication of the order.

The petitioner submits that as the allegation of snatching and looting of ballot papers at the time of counting from the counting table has been found to be correct and has been admitted by the Commission, accordingly, remedial measure by way of revoking the election certificate and conducting fresh election ought to have been taken by the Commission. Despite noticing the illegality committed at the behest of the private respondent the Commission ought not to have disposed of the complaint filed by the petitioner by observing that an election petition has to be filed for redressal of the grievance of the petitioner.

It has been submitted that to prevent injustice from being perpetrated, the State Election Commission ought to have directed cancellation of the election certificate with further direction to hold fresh election.

Prayer has been made to set aside the impugned order with consequential direction to cancel the election certificate issued in favour of the private respondent and thereafter hold fresh election.

Learned advocate representing the State respondents and the State Election Commission submits, in unison that, after declaration of result and after issuance of the election certificate the Commission become functus officio and, as such, the Commission does not have any authority either to revoke or to cancel the election certificate issued in favour of the winning candidate.

In support of the aforesaid contention learned advocate representing the Commission relies upon the judgment delivered by the Hon'ble Patna High Court in the matter of **Sanjay Kumar @ Sanju Yadav** reported in **2008 SCC Online Pat 1114** wherein the Court was of the opinion that in the absence of specific provision of law, the Returning Officer cannot review or recall the order passed.

Reliance has also been placed on the judgment delivered by the Hon'ble High Court of Jharkhand at Ranchi in the matter of **Basanti Devi vs. The State of Jharkhand & Ors.** reported in **MANU/JH/1184/2012** wherein the Court categorically held that after declaration of result the Returning Officer becomes ex-officio and the Returning Officer neither can

entertain application for recounting nor can cancel the declaration of result and the consequential certificate and the only course open for the aggrieved party is to file election petition for redressal of grievances.

Reliance has also been placed on a decision delivered by this Bench in the matter of ***Sabita Roy & Anr. vs. The State of West Bengal & Ors.*** reported in ***2023 SCC Online Cal 5411*** wherein the Court held that the Panchayat Returning Officer does not have any power to review and, accordingly, the certificate of election could not have been cancelled.

Prayer has been made by the respondents for dismissal of the writ petition.

Despite service none represents the candidate in whose favour the election certificate was issued.

I have heard and considered the submissions made on behalf of both the parties.

The election in question was held in accordance with the said Act. Section 76 of the said Act mentions that when the counting of votes has been completed, the Panchayat Returning Officer shall, in absence of any direction by the Commission to the contrary, forthwith declare the result of the election in the manner provided by the Act or the Rules framed thereunder.

Section 134 of the said Act mentions that the Commission may nominate an Observer to watch the conduct of the election and to perform

such other functions as may be entrusted by the Commission. The Observer has the power to direct the Panchayat Returning Officer to stop the counting of votes at any time before the declaration of the result or not to declare the result if, in the opinion of the Observer, booth capturing took place at the counting centre or any ballot paper used at a polling station is unlawfully taken out of the custody of the Panchayat Returning Officer or intentionally destroyed or damaged or tampered to such extent that the result of the poll cannot be ascertained.

Specific allegation of the petitioner is that snatching of ballot papers took place in the counting hall and the aforesaid allegation of the petitioner has been enquired and found to be correct. The impugned order of the State Election Commissioner clearly mentions that the Panchayat Returning Officer and the Block Development Officer as well as the Observer gave verbal instruction to the counting officer not to proceed with the counting any further.

On enquiry it was also found that the margin between the winning and the losing candidate is minimal and less than the lost ballots. The aforesaid officers could visualize that on account of the snatching and looting of ballot papers, declaration of result cannot be made and, rightly directed the counting officer to stop the counting process. The counting officer, for reasons best known to him, not only proceeded with the counting but also declared the result and issued the election certificate.

The State Election Commissioner has already directed a probe to be conducted to ascertain the conduct of the counting officer but the question is whether the election certificate which was issued in favour of the winning candidate despite illegalities being noticed at the time of counting can be set aside by the Court under Article 226 of the Constitution of India. The respondents have opposed the prayer of the petitioner and have submitted that after the declaration of the result and after issuance of the election certificate the only remedy available to the aggrieved party is to approach the competent forum with an election dispute.

Will it be proper for the writ Court to refuse to undo the wrong even after noticing the fact that issuance of election certificate, in the given facts and circumstances, was absolutely improper and illegal? Can the Constitutional Court not interfere ever after noticing that illegality was committed at the time of counting and the election certificate ought not to have been issued in the facts and circumstances of the instant case? Will the illegality of proceeding with the counting and thereafter declaring the result and issuing the election certificate be permitted to continue? Will it not be a continuing wrong to permit a candidate to act as the people's representative even after noticing that illegality was committed at the time of counting of votes and subsequent declaration of result and issuance of the election certificate could not have been possible? Will it not result in miscarriage of justice if the wrong is not undone and remedial measures not taken in the interest of justice?

The answer to the aforesaid questions lies in the decision lately delivered by the Hon'ble Supreme Court in the matter of ***Union Territory of Ladakh & Ors. vs. Jammu & Kashmir National Conference & Anr.*** reported in **2023 SCC Online SC 1140** wherein the Court held that the powers of the High Court vested under the Constitution cannot be abridged, excluded or taken away, being part of the basic structure of the Constitution. Availability of an alternative efficacious remedy is no bar to the exercise of high prerogative writ jurisdiction. The High Court, being a Constitutional Court, is not, by any stretch of imagination, precluded from issuing a direction under Article 226 of the Constitution when such direction does not violate any statutory provision.

The Court held that elections to any office/ body are required to be free, fair and transparent. Elections lie at the core of democracy. The authority entrusted by law to hold/ conduct such elections is to be completely independent of any extraneous influence/ consideration.

It was held that the Court would categorically emphasize that no litigant should have even an iota of doubt or an impression that just because of systemic delay or the matter not being taken up by the Court resulting in efflux of time the cause would be defeated, and the Court would be rendered helpless to ensure justice to the party concerned. It was held that the Court can even turn the clock back if the situation warrants such dire measures. The Court concluded that there is no bar on the High Court, on principle, to entertain petition relating to elections. The restraints followed by the Court are self-imposed but where issues crop up indicating

unjust executive actions or an attempt to disturb a level playing field between candidates and/or political parties with no justifiable or intelligible basis, the Constitutional Courts are duty bound to step in.

In the instant case it can be conclusively held that the counting officer acted contrary to the direction passed by the Panchayat Returning Officer and the Block Development Officer and also the Observer and continued with the counting and thereafter declared the result and issued the election certificate. The counting officer ought to have immediately stopped the counting on account of snatching/ looting of ballot papers from the counting table. The counting officer acted in a high-handed manner and proceeded with the counting despite direction to stop the same. Counting of votes has been reduced to a farce. The result of counting is certainly a faulty one as all the ballot papers could not be counted because of the snatching/ looting of ballot papers from the counting table. The result declared by the counting officer has to be held as an erroneous one and election certificate could not have been issued relying upon the figures arrived at. Permitting the candidate who allegedly secured more votes in a faulty counting process would amount to perpetrating illegality which is liable to be interfered with by the Court.

If no action is taken and the matter is brushed aside lightly by observing that the Commission has become functus officio and election petition is the only remedy, then the same will amount to travesty of justice and the perpetrators will be emboldened to commit similar offence in future under the pseudo impression that their illegal activities would go scot free.

On the contrary, the Court is of the opinion that the Commission ought to have taken a proactive stand and should have stopped the counting immediately when the incident of snatching and looting of ballot papers came to the knowledge of the Commission. The Commission, being the ultimate authority to conduct the election in a free, fair and transparent manner, cannot shrug off its responsibility and relegate the complainant to file election petition.

It has to be kept in mind that election petitions are a separate class of cases where individual private rights of the parties are not espoused. These cases are primarily to uphold the purity of an election process. Democracy is not a toy to be snatched away or looted by muscle power. It is a very powerful tool in the hands of the general public, the electorate, on whose mandate the country is run. The moment such incidents comes to the fore, it is to be immediately crushed with an iron hand so that it cannot raise its ugly head ever again.

It is common knowledge that disposal of an election petition takes some time and would certainly involve some financial expenses. Assuming the complainant is not in a position to approach the competent forum for any reason whatsoever, in that case the illegality gets legalized. Then, what is the reason to cause the probe and what will the Commission do if in the probe it is ultimately proved that the counting officer continued with the counting despite direction to stop/call off the same. The Commission will again fall back on the same reasoning that after declaration of result and after issuing the election certificate, the Commission has no role to play. The

same will amount to disregarding the mandate of the people and a blotch in the principle of democracy enshrined in the preamble of the Constitution.

The Commission has not disclosed the fate of the probe that has been directed to be conducted by the District Magistrate which implies that the probe, if any, is a mere eye wash and an idle formality. There is also no mention about the fate of the request made by the Panchayat Returning Officer and the Block Development Officer seeking permission of the State Election Commission for cancellation of the certificate given in Form 24.

It is true that in usual course of events the Election Commission and its functionaries becomes *functus officio* after the declaration of results and after issuance of the election certificate but the facts of the instant case are completely different from the facts of the case in the matter of Sabita Roy (*supra*), Sanjay Kumar (*supra*) and Basanti Devi (*supra*). In none of the above matters there was direction upon the counting officer not to proceed with the counting. The direction to stop counting is a clear indication that counting any further would be futile as there would be no finality to the result of counting and the figure arrived at is bound to be erroneous.

The Commission ought to take bold steps to uphold the goal and value of democracy and not let antisocial elements and hooligans trample democracy right under its nose. Had it been a case where the illegal activity remained undetected, then the reasoning of the Commission may have been held to be plausible, but when the offence came to the knowledge of the machineries of the Commission, then prompt necessary action to stall the

counting process was the only remedy to prevent miscarriage of justice. Technicalities should not stand in the way of proper dispensation of justice. The Court would be miserably failing in its constitutional duty to uphold the democracy if the impugned order of the Commission is not interfered with.

Under such admitted facts and circumstances, the State Election Commissioner ought not to have mechanically directed the aggrieved party to file an election petition for redressal of grievances. It will be absolutely improper, unfair, unjust and illegal to permit a candidate to act as an elected representative of the constituency even after noticing the fact that counting did not take place smoothly and properly and the result of the election does not reflect the mandate of the electorate. In such a situation the only option is to set aside the result that was declared and pass direction for cancellation/ revocation of the election certificate issued in favour of the so-called winning candidate.

Accordingly, the result of the panchayat election in the subject constituency is declared null and void. The election certificate issued in favour of the respondent no. 10, Saima Jamadar stands cancelled. The Block Development Officer is directed to communicate this judgment to the respondent no. 10 and restrain her from functioning as elected representative of the gram panchayat. The seat of the respondent no. 10 shall be treated as vacant on and from this date and the State Government in consultation with the Commission shall forthwith take necessary steps for holding fresh election to fill up the vacancy that has been created.

Writ petition stands disposed of. No order as to costs.

Urgent certified photocopy of this judgment, if applied for, be supplied to the parties or their advocates on record expeditiously on compliance of usual legal formalities.

(Amrita Sinha, J.)