IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.1717 of 2023

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Md. Tazuddin, Son of Sagir Shah @ Sagiruddin, Resident of Bisfi Garhiya, P.S.- Bisfi, P.O.- Rathon, District- Madhubani.

... ... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Panchayati Raj, Bihar, Patna.
2. State Election Commissioner of Bihar, 3rd floor Sone Bhawan R. Block Chauraha, Veer Chandra Patel Path, Patna, Bihar.
3. District Election Officer (Panchayat) Cum District Magistrate, Collectriate at Madhubani, P.S.- Madhubani.
4. Election Officer (Panchayat) Cum Sub Divisional Officer, Benipatti at Benipatti, District- Madhubani.
5. Ajay Sah, Son of Bechan Sah Resident of Bhairwa, P.S.- Bisfi, Sub Division, Benipatti, District- Madhubani.
6. Umesh Nat, Son of Ramji Nat Resident of Parsauni, P.S.- Bisfi, District- Madhubani.
7. Ajay Kumar, Son of Deo Narayan Mandal Resident of Parsauni, P.S.- Bisfi, District- Madhubani.
8. Dilip Kumar Mandal, Son of Chandeshwar Mandal Resident of Nahas Rupauli, P.S.- Bisfi, District- Madhubani.
9. Anchaladhikari (Circle Officer), Anchal- Bisfi, District- Madhubani.

... ... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Kalyan Shankar, Advocate
For the Respondent/s	:	Mr. Ajay, GA-5
		Mr. Prateek Kumar Sinha, AC to GA-5
For the B.S.E.C.	:	Mr. Girish Pandey, Advocate
For the Resp No.5	:	Mr. Shankar Kumar Thakur, Advocate
For the Resp No.6	:	Mr. S. N. Yadav, Advocate
		Mr. Saroj Kumar, Advocate

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CORAM: HONOURABLE MR. JUSTICE HARISH KUMAR
CAV JUDGMENT
Date : 24-11-2023

Heard the parties.

2. This writ petition has been filed challenging the

order dated 12.10.2022 passed by the Court of learned Sub-Judge-I, Civil Court, Benipatti, in Election Suit No. 02 of 2022, by which the learned court has allowed the Election Petition filed by Respondent No.5 herein and set aside the Election of the petitioner dated 12.12.2021 for the post of Member of Madhubani Zila Parishad Territorial Constituency No.12 and further directed the State Election Commission to conduct the Election afresh within six months from today. It has further been directed to assess the cost of fresh election and realize the same from the officials, who are responsible for the improper acceptance of nomination of opposite party no.4 (respondent no.6 herein) and to lodge an F.I.R. against the respondent no.6 for procuring forged caste certificate leading to his improper acceptance of nomination and also enquire the role of the then Circle Officer, Bisfi, Madhunbani and opposite party no.5 (petitioner herein) in the issuance of forged certificate.

3. The short facts as enumerated from the record is/are that in the year 2021 the State Election Commission has notified election for the post of member of Madhubani Zila Parishad. The date of nomination was fixed from 18.11.2021 to 24.11.2021. The scrutiny of nomination paper was on 27.11.2021 and the candidates were allowed to take back the nomination paper by 29.11.2021. The allotment of symbol to the

respective candidates was made on 29.11.2021. The date of election was fixed on 12.12.2021 and the date of counting was fixed on 14.12.2021.

4. The Madhubani Zila Parishad Territorial Constituency no.12 (hereinafter referred to as 'the Constituency No.12')was reserved for Extremely Backward Classes and the candidates filing their nomination paper for the election must belong to Extremely Backward Classes. The petitioner having the requisite qualification and being member of Extremely Backward Class filed his nomination paper for contesting the election in the Constituency no.12. Apart from other candidates, the respondent no.6 also filed nomination paper on 20.11.2021 enclosing caste certificate bearing no. BCCCO/2021/2440584 dated 15.04.2021 issued by the Circle Officer, Bisfi, Madhubani showing his caste as "CHAI" falling under the E.B.C. category. The election petitioner (respondent no.5 herein), who filed Election Case No. 02 of 2022, also filed his nomination as member of Extremely Backward category.

5. The election was held on the scheduled date and counting of the votes commenced on 14.12.2021. Consequently, the result was announced and the petitioner has been declared as successful. It was found that writ petitioner secured 14092 votes

whereas Umesh Nat (respondent no.6) and Ajay Sah (respondent no.5) secured 2387 and 12716 votes respectively. The another candidate Ajay Kumar secured 3665 votes and Dilip Kumar Mandal secured 2117 votes. The margin of the defeat of the election petitioner (respondent no.5) by the petitioner was 1376 votes. Thereafter the petitioner took oath as a returned candidate to the Constituency No.12.

6. The respondent no. 5 (Ajay Sah) aggrieved by the result of the election, filed Election Suit No. 02 of 2022 in the Court of learned Sub-Judge-I, Civil Court, Benipatti on the ground that respondent no.6 contested the election on the forged and fabricated caste certificate.

7. It is the case of election petitioner-respondent no.5 that on 27.11.2021, he filed objection before the Collector at the time of scrutiny of nomination paper of respondent no.6, mentioning therein that respondent no.6 belongs to Nat by caste, which falls in the category of Scheduled Caste, but on the basis of forged caste certificate produced by him, is contested the election for the Territorial Constituency no.12 and, thus, prayed for cancellation of the nomination of respondent no.6. The aforenoted objection is shown to be received in the office on 29.11.2021.

8. Having found no response, the respondent no.5 filed another complaint before the respondent no.3 on 30.11.2021, but it was also resulted in the same fate and no action was taken. Despite the objections being raised, the respondent no.6 was allowed to contest the election, in question, only with intent to waste vote of respondent no.5 and to make burglary in his vote while the Election Commission already reserved the Constituency No.12 for Extremely Backward Class. The writ petitioner obtained 14092 votes and respondent no.5 obtained 12716 votes, whereas respondent no.6 obtained 2387 votes. It is submitted on behalf of the respondent no.5 that the election for the post of member Zila Parishad was badly affected and the respondent no.6 has obtained the votes of respondent no.5. If the nomination paper of respondent no.6 had declared invalid, then the respondent no.5 would have got most valid votes leading to victory.

9. It has further been stated by the election petitioner that due to acceptance of illegal nomination of respondent no.6, by the Returning Officer, the fairness and impartiality of the election of Constituency No.12 was badly affected and based upon illegal votes, the respondent Election authority has decided that the petitioner is elected as member of Constituency No.12 by securing highest votes, which is void

and illegal since inception.

10. He thus submitted that the Election Officer Panchayat -cum- Sub-Divisional Officer, Benipatti by adopting a corrupt practice under the influence of District Election Officer-cum-District Magistrate, Madhubani and the petitioner legalize the invalid nomination paper of respondent no.6.

11. It would be worth noting here that the election petition having been admitted on 23.02.2022, the summons were issued against the respondents to the election petition through both the modes and further notices have also been served through the substituted mode by Gazette publication, but the writ petitioner and the opposite party no.6 (herein) have not entered their appearance and the case was proceeded ex-parte against all the absent parties.

12. In the aforenoted Election Suit No. 02 of 2022, the respondent nos. 3 and 4 entered their appearance and filed written statement stating therein that the election petitioner has no basis to file this Election petition, as election petitioner obtained only 12716 votes, on the other hand the winning candidate (petitioner) has obtained 14092 votes, which is high in margin. That apart, the entire process of election was conducted fairly, including counting and result. It is also submitted that

nomination of opposite party was accepted on the basis of caste certificate issued by the competent authority. Counting was made fairly in presence of the contesting candidates in the supervision of PRAVEKSHAK of Election Commission, Assistant Counting Officer and the Micro Observer in the light of the direction issued by the Election Commission.

13. On the basis of the pleading of parties, the learned Election Tribunal has framed the issues, the relevants are as follows:

> *"(6) Whether the Respondent No.2 (O.P. No.4) belongs to Nat caste falls under the category of Scheduled Caste and was not eligible to contest the election for the post of Member of Madhubani Zila Parishad Territorial Constituency No. 12?*
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> *(7) Whether the nomination of Respondent No.2 (O.P. No.4) for the election of the post of Member of Madhubani Zila Parishad Territorial Constituency No. 12 was improperly accepted on the basis of forged caste certificate by adopting corrupt practices?*
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> *(8) Whether the impugned acceptance of nomination of Respondent No.2 (O.P. No.4) has materially affected the elections of OP No.5 and on this ground the election of Respondent No.3 (O.P. No.5) is illegal, valid*

and fit to be set aside?"

14. It would be worth mentioning here that apart from the oral evidence, the documentary evidences have also been produced and exhibited by the Election petitioner during his examination-in-chief in support of his pleadings made in the Election Petition.

15. The learned Election Tribunal after considering the pleadings and evidences, allowed the Election Suit No. 02 of 2022 and set aside the Election of the petitioner vide his judgment and order dated 12.10.2022 after arriving at the following findings in respect of issue no.6, the learned court has held that respondent no.6 Umesh Nat is the member of Nat caste falling under the category of Scheduled Caste has procured fabricated caste certificate of "CHAI" caste falling under the category of Extremely Backward Class, for which he was not entitled to contest the election of the post of Constituency No.12.

16. With respect to issue no. 7, the Election Tribunal held that the nomination of respondent no.6 for the election of Member of Madhubani Zila Parishad Territorial Constituency No.12 was improperly accepted on the basis of his forged caste certificate, by adopting corrupt practice and thus this issue is decided in favour of the election petitioner and

against the respondent.

17. Lastly with regard to issue No.8, the learned Election Tribunal held that the election petitioner has undoubtedly established that due to improper acceptance of nomination of opposite party no.4 (respondent no.6 herein), it has materially affected the election, thus the returned candidate (writ petitioner) is not entitled to hold the post of Member of Madhubani Zila Parishad Territorial Constituency No.12 and if this will not be declared void and illegal then the faith of the people in the democratic set up will affect and no honest people will come forward to contest the election, which will ultimately frustrate our constitutional goal to make more powerful to the local bodies for mass participation of people in democratic set up to strengthen it.

18. In the aforesaid backdrop the Election Tribunal held that the election petitioner has undoubtedly established that the election of the returned candidate (petitioner) is materially affected by the improper acceptance of nomination of opposite party no.4 (respondent no.6), which is liable to be set aside and accordingly this issue has also decided in favour of the election petitioner and against the respondent no.6.

19. The learned Election Tribunal while deciding

the issues in favour of the election petitioner has also held that no other contestant candidate, including the returned candidate had raised the question on improper acceptance of nomination of respondent no.6 even in later stage after the acceptance of nomination; and after counting, returned candidate had secured 14092 votes, election petitioner had secured 12716 votes and opposite party no.4 (respondent no.6), whose eligibility was under question, had secured 2387 votes and the election petitioner had lost his election only by 1376 votes. Margin of the votes between the returned candidate (O.P. No.5-petitioner) and the petitioner is only 1376 votes. The opposite party no.4 (respondent no.6) had secured 2387 votes, which are much more than 1011 votes from the margin of the votes between the returned candidate (petitioner) and the election petitioner i.e. 1376 votes, which is enough to affect the election at any level.

20. While assailing the aforesaid judgment/order of the Election Tribunal, learned counsel for the petitioner submits that the impugned judgment/order is based upon hypothesis, only an assumption and presumption, which does not stand to reason as to on what basis the learned Election Tribunal came to the conclusion that as the difference of votes between the writ petitioner and the election petitioner was only 1376 votes and the respondent no.6 secured 2387 votes and thus it materially

affected the election. It is further submitted that no evidence from the side of the election petitioner was brought on record to even remotely suggest that the entire votes so secured by Umesh Nat (respondent no.6), in his absence, would have been transferred in his favour. Learned counsel further clarified that altogether five candidates were contested the election and the writ petitioner secured 14092 votes, Election petitioner secured 12716 votes, Umesh Nat secured 2387 votes, Ajay Kumar secured 3665 votes and Dilip Kumar Mandal secured 2117 votes. The margin of defeat of the election petitioner is 1376 votes and it is further submitted that had Umesh Nat not contested the election, then votes secured by him may not be said to have cast only in favour of the election petitioner.

21. It is also submitted that 2387 votes secured by Umesh Nat, even if it is distributed among the four candidates then also margin of the victory of the petitioner is more than 500 votes but these aspect of the matter were not considered by the learned Election Tribunal, rather the election was set aside in terms of Section 139 of the Bihar Panchayat Raj Act, 2006, which incorporates the improper acceptance of nomination as one of the ground for setting aside the Election. It is further submitted that the election petitioner had to prove his case based on pleading in the election petition and evidence adduced during

the course of trial and not by any presumption that, had Umesh Nat not contested the election then the election petitioner would have won the election.

22. It is also one of the submission of the petitioner that even if it is assumed that the arguments put forth by the election petitioner and the findings thereto by the learned Election Tribunal be correct even then no fault has been found in the nomination paper of petitioner nor in the process of election and furthermore no material has been brought on record suggesting the involvement of the petitioner in corrupt practice and as such the court below had no justification to declare the election of the petitioner as null and void. The petitioner being the people's representative, thus nullification of election of the petitioner would amount to deprivation of the right to choose the representative of the people of Constituency No.12, Madhubani, which eventually means denial of the democratize right of the people of the said constituency in the 3 tier of democracy. He lastly submits that one cannot take advantage that the entire votes, which was cast in favour of Umesh Nat i.e. 2387 votes would have gone in favour of the nearest rival Ajay Sah (respondent no.3).

23. A detailed counter affidavit has been filed on

behalf of the Election petitioner-respondent no.5 herein in support of the impugned judgment/order. Apart from the other grounds it is submitted that the present writ petition is not maintainable in view of the Order IX Rule 13 of the Code of Civil Procedure because the remedy of the writ petitioner lies before the concerned court, who passed the aforesaid judgment. Order IX Rule 13 of the CPC, deals with the issue for setting aside the ex-parte decree and stipulated that in any case ex-parte decree is against the defendant, he may apply to the court by which the decree was passed for an order to set aside and if satisfies the court that the summons was not duly served or that he was prevented by any sufficient cause appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms. In the present case, the petitioner has admitted in paragraph no.10 of the writ application that the notice was served on the petitioner but he did not appear nor shown any sufficient cause that he was prevented from appearing the aforesaid election petition. That being so, the writ petition may be dismissed on this count alone.

24. He further submits that the entire election is vitiated in view of Section 139(1)(d)(i) of the Bihar Panchayat Raj Act, as the result of the election, in so far as it concerns a returned candidate, has been materially affected by improper

acceptance of the nomination of respondent no.6. In the present case, the respondent no.6 belongs to Nat caste, which falls in the category of Scheduled Caste, but he in collusion with respondent no.3, filed his nomination paper enclosing caste certificate of Extremely Backward Class and despite objection being raised by the respondent no.5, the respondent no.3 has improperly accepted the nomination paper of respondent no.6 and allowed to contest the election on the basis of forged caste certificate. He also submits that respondent no.6 has obtained 12714 votes, which is quite decisive, because the vote obtained by the respondent no.6 made petitioner won because the margin of votes between the returned candidate and the runner was only 1376 votes, in this way the same has materially affected the entire election process on account of corrupt practice.

25. He lastly submits that not only the principles, but even the procedures, including the amendment, prescribed in the Code of Civil Procedure is applicable in such election matter, except those which are specifically barred by any provision of Act or Rules under which election is held, thus in any view of the matter the present writ petition would not be maintainable. Reliance has also been placed on judgments of this Court, in the case of **Mamta Devi Vs. The State of Bihar & Ors.**, reported in **2016(4) PLJR 258, Anand Kumar Vs. Sri**

Lal Babu Rai & Ors., reported in **2017 (3) PLJR 707** and **Shri Bhagwan Singh Vs. The State of Bihar & Ors**., reported in **2010 (4) PLJR 640**.

26. A counter affidavit has also been filed on behalf of respondent nos. 3, 4 and 9. Mr. Prateek Kumar Sinha, learned counsel representing the State, with reference to the averments made therein, submits that the caste certificate issued in favour of respondent no.6 was based upon the affidavit sworn by him and any allegation of collusion of the State officials/ returning officer with the respondent no.6 is unfounded and based upon no materials. Moreover, the Election was held in accordance with the Rules and Regulation under the supervision of State Election Commission and after the election, candidate wise valid votes are mentioned in form 21, which was sealed after counting process has been completed.

27. It is also submitted that the Hon'ble Court in the case of **Ram Roop Devi Vs. The State of Bihar & Ors. 2017 SCC OnLine Pat. 449** while considering the challenge of the judgment passed by the Election Tribunal on the ground of acceptance of improper nomination paper has been pleased to hold that since there was specific direction of State Election Commission and a manual of Bihar Panchayat Raj Election was

supplied to every Election Officer, which contemplates therein that at the time of scrutiny, nomination will not be rejected on the ground of incompleteness. Thus, there was no chance for returning officer to accept improper nomination paper, so nomination paper of returned candidate was complete under the provisions of Act, 2006.

28. While summing up his submission, he contended that the present writ petition under Article 226 of the Constitution is not at all maintainable and the petitioner has remedy of Miscellaneous appeal. In support of his contention, reliance has been made on a judgment rendered by the Court in the case of **Sangita Kumari Vs. the State of Bihar & Ors. (CWJC No. 4400 of 2019),** decided on 08.01.2020.

29. The respondent no.6, though ensured his appearance through Mr. S. N. Yadav, learned counsel, but no counter affidavit has been filed on his behalf.

30. In sum and substance, he submitted that at no point of time before coming to the conclusion that the caste certificate of respondent no.6 is forged, he has been allowed any opportunity to rebut the same and proved otherwise. At the end, he submits that the order passed by the Election Tribunal is, apart from, perverse, suffers from material irregularity and thus

the same is fit to be set aside and the matter may be remitted to the Election Tribunal for the ends of justice.

31. This Court has given anxious consideration to the submissions advanced on behalf of the parties and also minutely gone through the materials available on record, including the impugned judgment passed by the Election Tribunal.

32. Primarily, so far the issue with regard to maintainability of the writ petition against the judgment passed by the Election Tribunal is concerned. It is well settled that right to challenge election is neither fundamental nor a commonly right, it is a statutory right in favour of the aggrieved person, who was candidate to the election to file an Election Petition under Section 137 of the Act, 2006 on the grounds as prescribed under Section 139 thereof. Under the Bihar Panchayat Raj Act, 2006, no provision of any appeal has been prescribed to the person aggrieved by the order/judgment in an election petition filed under Section 137 of the Bihar Panchayat Raj Act, 2006 (hereinafter referred to as ‘the Act, 2006’). Thus, there being no remedy or appellate authority prescribed, writ petition under Article 226 is appropriate remedy.

33. Needless to observe that the order/judgment of

the Tribunal can be assailed before the High Court under Article 227 of the Constitution of India and the issue has also been set at rest by the Apex Court in the case of **Radhey Shyam & Another Vs. Chhabi Nath & Ors., (2015) 5 SCC 423**.

34. In view of the settled legal position, this Court does not find any fault in the present writ petition, as the same has been filed under Article 226 and 227 of the Constitution of India.

35. So far the submissions raised on behalf of the Election petitioner-respondent no.5 herein while supporting the impugned judgment that the present writ petition is not maintainable in view of the statutory remedy under Order IX Rule 13 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the CPC'), which deals with the issue for setting aside an ex-parte decree, this Court is of the opinion that the same is wholly misconceived and fit to be rejected.

36. It would be worth noted here that a person, on being aggrieved by the ex-parte order/judgment, has the remedy provided under Order IX Rule 13 of the CPC, but simultaneously there is no bar to assail the order before the appellate forum or appropriate court having jurisdiction to examine the legality of the judgment on its merit, if the person

aggrieved is satisfied that the judgment is per se illegal, perverse and wholly without jurisdiction and not sustainable in law. It would be worth highlighting that mandate of the Supreme Court in the case of **Neerja Realtors Pvt. Ltd. Vs. Janglu, (2018) 2 SCC 649**, wherein the three judge Bench of the Hon'ble Court has held as follows:

> "17. A defendant against whom an ex parte decree is passed has two options: the first is to file an appeal. The second is to file an application under Order 9 Rule 13. The defendant can take recourse to both the proceedings simultaneously. The right of appeal is not taken away by filing an application under Order 9 Rule 13. But if the appeal is dismissed as a result of which the ex parte decree merges with the order of the appellate court, a petition under Order 9 Rule 13 would not be maintainable. When an application under Order 9 Rule 13 is dismissed, the remedy of the defendant is under Order 43 Rule 1. However, once such an appeal is dismissed, the same contention cannot be raised in a first appeal under Section 96. The three-Judge Bench decision in Bhanu Kumar Jain (2005) 1 SCC 787 has been followed by another Bench of three Judges in Rabindra Singh v. Financial Commr., Cooperation (2008) 7 SCC 663, and by a two-Judge Bench in Mahesh Yadav v. Rajeshwar Singh (2009) 2 SCC 205."

37. Similar issue has been raised in the case of **N. Mohan Vs. R. Madhu, (2020) 20 SCC 302**, wherein a three

Judge Bench referring to **Neeraj Realtors** (supra) and other judgments held that the aggrieved person can take recourse to both proceedings. It would be apposite to quote para. 14 and 15 of the judgment for appreciation of the issue:

> "14. Considering the scope of Order IX Rule 13 CPC and the statutory right to appeal under Section 96(2) CPC, after referring to Bhanu Kumar Jain Vs. Archana Kumar, (2005) 1 SCC 787, in Bhivchandra Shankar More Vs. Balu Gangaram More, (2019) 6 SCC 387, this Court held as under (Bhivchandra Shankar More P. 392, paras-11-12):-
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> > "11. It is to be pointed out that the scope of Order 9 Rule 13 CPC and Section 96(2) CPC are entirely different. In an application filed under Order 9 Rule 13 CPC, the Court has to see whether the summons were duly served or not or whether the defendant was prevented by any "sufficient cause" from appearing when the suit was called for hearing. If the Court is satisfied that the defendant was not duly served or that he was prevented for "sufficient cause", the court may set aside the ex parte decree and restore the suit to its original position. In terms of Section 96(2) CPC, the appeal lies from an original decree passed ex parte. In the regular appeal filed under Section 96(2) CPC, the appellate court has wide jurisdiction to go into the merits of the decree. The scope of enquiry under two provisions is entirely different. Merely

because the defendant pursued the remedy under Order 9 Rule 13 CPC, it does not prohibit the defendant from filing the appeal if his application under Order 9 Rule 13 CPC is dismissed.

12. The right of appeal under Section 96(2) CPC is a statutory right and the defendant cannot be deprived of the statutory right of appeal merely on the ground that the application filed by him under Order IX Rule 13 CPC has been dismissed. In Bhanu Kumar Jain v. Archana Kumar and Another (2005) 1 SCC 787, the Supreme Court considered the question whether the first appeal was maintainable despite the fact that an application under Order IX Rule 13 CPC was filed and dismissed. Observing that the right of appeal is a statutory right and that the litigant cannot be deprived of such right, in paras (36) and (38), it was held as under:-

> 36. … A right to question the correctness of the decree in a first appeal is a statutory right. Such a right shall not be curtailed nor shall any embargo be fixed thereupon unless the statute expressly or by necessary implication says so. (See Deepal Girishbhai Soni v. United India Insurance Co. Ltd. (2004) 5 SCC 385 and Chandravathi P.K. v. C.K. Saji (2004) 3 SCC 734.) ……..”
>
> 15. The defendant against whom an ex-

> parte decree is passed, has two options. First option is to file an application under Order IX Rule 13 CPC and second option is to file an appeal under Section 96(2) CPC. The question to be considered is whether the two options are to be exercised simultaneously or can also be exercised consecutively. An unscrupulous litigant may, of course, firstly file an application under Order IX Rule 13 CPC and carry the matter up to the highest forum; thereafter may opt to file appeal under Section 96(2) CPC challenging the ex-parte decree. In that event, considerable time would be lost for the plaintiff. The question falling for consideration is that whether the remedies provided as simultaneous can be converted into consecutive remedies."

38. The analogy, which is deducible from the judgments referred hereinabove, this Court is of the opinion that any order/judgment passed by a Court or Tribunal even if it is ex parte is amenable to writ jurisdiction under Article 226 and 227 of the Constitution of India and such power cannot be scuttled nor any embargo be fixed thereupon, on the plea of remedy provided under Order IX Rule 13 of the C.P.C.

39. Coming to the issue that the candidature of respondent no.6 in the election held on 12.12.2021 has materially affected the result of respondent no.5, because the respondent no.6 secured 2387 votes and difference between the petitioner (winning candidate) and respondent no.5 was only

1376 votes.

40. It is to be noted that there is no allegation against the petitioner of he being indulged in corrupt practices or he anyhow secured improper votes or he was instrumental in getting the nomination of respondent no.6 done. The entire case of respondent no.5-election petitioner is based upon improper acceptance of nomination of respondent no.6 by producing forged and fabricated caste certificate and thus he was not eligible to contest the election and his nomination was improperly accepted. The findings of the learned Tribunal that after counting it was found returned candidate (petitioner herein) had secured 14092 votes, the Election petitioner (respondent no.5 herein) had secured 12716 votes and opposite party no.4 (respondent no.6 herein) whose eligibility was under question, had secured 2387 votes and the election petitioner had lost his election by 1376 votes. Thus, the margin of the votes between the returned candidate and the election petitioner was only 1376 votes, whereas the opposite party no.4 (respondent no.6 herein) had secured 2387 votes, which was much enough from the margin of votes between the returned candidate and the election petitioner and, as such, the same is enough to affect the election at any level.

41. The finding of the Election Tribunal does not stand to any reason as to how he came to the conclusion that to what number of votes would be cast in favour of the returned candidate, the election petitioner and other candidates, who were contesting the election.

42. It is well settled that election cannot be set aside and declared void merely an assumption and presumption, rather its void character should be clear as a crystal and be staring at a returned candidate. This Court in the case of **Bibi Rukhsana Khatoon @ Roksana Khatoon Vs. The State of Bihar & Ors**, reported in **2016 (1) PLJR 109** while considering the illegality of the judgment passed by the Election Tribunal has been pleased to hold that "until such time that the election tribunal is satisfied that the entire election is marred with improper reception of votes or reception of void votes, there would not be any occasion to countermand the entire election where a challenge has been made on this ground in respect of a lone booth. It is not simply on confirmation of improper reception of void vote or refusal of valid vote that can lead to countermanding of an election until such time that it is proven beyond any shadow of doubt that such reception of void vote in favour of the returned candidate and refusal of valid vote in favour of the candidate other than the returned candidate has

contributed to the success of the returned candidate."

(**Emphasis supplied**)

Moreover, when there is no charge by election petitioner that returned candidate has indulged in corrupt practice or has facilitated casting of invalid votes.

43. In the case of **Usha Devi Vs. The State of Bihar, 2013 (2) PLJR 953**, this Court has held that election of a returned candidate shall not be rendered void unless and until it is proved that the result of the election insofar as it concerns, a returned candidate is materially affected. The volume of opinion expressed in judicial pronouncements preponderates in favour of the view that the burden of proving that the votes not cast would have been distributed in such a manner between the contesting candidates as would have brought about the defeat of the returned candidate lies upon one who objects to the validity of election. Therefore, the standard of proof to be adopted, to be judging the question whether the result of the election in so far as it concerns a returned candidate is materially affected, would be proved beyond reasonable doubt or beyond the pale of doubt but not the test of proof.

44. The conclusive finding of the learned election tribunal that the difference of votes between the returned

candidate and the election petitioner is 1376 votes and the hypothetical presumption that had the respondent no.6 would not have contested the election on the basis of forged and fabricated caste certificate, the election petitioner would have secured more votes than the returned candidate, does not stand to any reason based upon any finding.

45. This Court having gone through the judgment of the Election tribunal also does not find any finding showing collusion of the petitioner with respondent no.6 and only on the ground that nomination of respondent no.6 has not been assailed by the returned candidate-petitioner and others, they are allegedly held to be in collusion with the respondent no.6 is not acceptable and fit to be rejected in absence of any materials to support the allegation of the election petitioner.

46. Now coming to the point as to whether acceptance of nomination of respondent no.6 has materially affected the election and thus it be held to be illegal and void.

47. So far the finding of the election tribunal that the acceptance of the improper nomination has materially affected the result of the election is concerned, it would be proper to quote the provisions of Section 139 of the Act, 2006, which contemplates the grounds for declaring the election to be

void. Section 139 (1) reads as follows:

> **"139. Grounds for declaring election to be void.** - (1) Subject to the provisions of sub-section (2) if the prescribed authority is of opinion-
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> (a) that on the date of his election, a returned candidate was not qualified or was disqualified, to be chosen as a member under this Act; or
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> (b) that any corrupt practice has been committed by a returned candidate or his agent or by any other person with the consent of a returned candidate or his agent; or
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> (c) that any nomination paper has been improperly rejected; or
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> (d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected-
>
> (i) by the improper acceptance of any nomination; or
>
> (ii) by any corrupt practice committed in the interests of the returned candidate by an agent; or
>
> (iii) by the improper reception, refusal or rejection of any vote or reception of any vote which is void; or
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> (iv) by any non-compliance with the provisions of this Act or of any Rules or orders made thereunder; the prescribed authority shall declare the

election of the returned candidate to be void."

48. It is an admitted fact that from the materials available on record, it is manifest that no corrupt practice has been adopted by the returned candidate or any other person with the consent of returned candidate or his agent in the entire election process in the interest of the writ petitioner, who was the returned candidate nor there is any cogent finding in this effect, hence result of the election has not been affected at all due to the reasons mentioned therein and thus so far Clause (d) of Section 139(1) of 2006 Act is concerned, from the facts and circumstances of the case, it is quite apparent that irrespective of acceptance of nomination of respondent no.6, which was found improper, the result of the election cannot be said to be materially affected.

49. In the opinion of this Court, the finding recorded in favour of the election petitioner (respondent no.5 herein) is undoubtedly resulted in presumptuous finding that the difference of the votes of returned candidate and the election petitioner is merely 1376 votes and the person, (respondent no.6), whose nomination has been improperly accepted held to be invalid, has secured 2387 votes, thus, the result of the election is materially affected, suffers from manifest errors of

law and fact and cannot be a basis for declaring the entire election void until it is confirmed that these votes had been certainly cast in favour of the election petitioner, had the respondent no.6 not been allowed to contest the election.

50. The Constitution Bench of the Hon'ble Supreme Court in the case of **Jagan Nath vs Jaswant Singh and Others**, since reported in **AIR 1954 SC 210**, while dealing with the propriety of the decision of the election tribunal has been succinctly held that "the general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the court possesses no common law power. It is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law. It is always to be borne in mind that though the election of a successful candidate is not to be lightly interfered with, one of the essentials of that law is also to safeguard the purity of the election process and also to see that the people do not get elected by flagrant breaches of that law or by corrupt practices. In cases where the election law does not

prescribe the consequence, or does not lay down penalty for non-compliance with certain procedural requirements of that law, the jurisdiction of the tribunal entrusted with the trial of the case is not affected."

51. It is trite that an election cannot be set aside as void, merely on assumption and presumption, rather its void character should be clear as a crystal and be supporting at a returned candidate.

52. Admittedly, there is no evidence of corrupt practice at the hands of returned candidate nor there is any issue of rejection of valid votes in favour of respondent no.5 nor improper reception of votes in favour of the returned candidate (petitioner) and thus the learned Tribunal has erred in law in coming to the conclusion based on hypothetical assumption and presumption and on this score alone the same is fit to be set aside.

53. The finding of the election tribunal to the effect that none of the candidates, including the writ petitioner, have challenged the nomination of the respondent no.6, which was later on found to be improper, conclusively proved their collusion with respondent no. 6 is quite erroneous and based upon only surmises without their being any material to support

the finding.

54. It is needless to observe that the burden of proof always lies on a person, who desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist. Only because the petitioner has not challenged the nomination of respondent no.6, the court cannot hold the collusion of the petitioner with respondent no.6 in absence of any cogent and reliable material to support the charge of collusion to each other.

55. It is also well settled that normally the finding based on appreciation of evidence by Election Tribunal is not interfered with unless it is shown to be perverse. However, if the approach of the Tribunal to the issue(s) is found not in accordance with law, then the conclusion arrived therein will naturally fall in the category of patent illegality.

56. In view of the discussions made hereinabove and the position obtaining in law, this Court finds sufficient reason to set aside the order dated 12.10.2022 passed by the Court of learned Sub-Judge-I, Civil Court, Benipatti, in Election Suit No. 02 of 2022 and accordingly, the same is hereby set aside.

57. The writ petition stands allowed. There shall be

no order as to costs.

(Harish Kumar, J)

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