

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR.

Rajendra Kumar vs. State of Rajasthan and others.

S.B. CIVIL WRIT PETITION NO.223/2004
Under Articles 226/227 of Constitution of India.

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Date : 21.12.2004

HON'BLE MR. PRAKASH TATIA, J.

Mr. Manish Shishodia, for the petitioner.

Mr. L.R. Upadhyay, Dy.GA. for respondents.

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REPORTABLE

BY THE COURT :

Heard learned counsel for the parties.

The petitioner was a candidate in the election for Sarpanch for the Gram Panchayat Raipur, Panchayat Samiti Raipur for which the elections were held on 31.1.2000. The petitioner's nomination paper was rejected by the Returning Officer on the ground that a child was born to him after cut off date i.e. 27.11.1995. The petitioner in his nomination paper disclosed that he had two sons Harsh and Abhishek. Harsh was given in adoption to Braham Dutt on 21.9.1993 by registered adoption deed. The petitioner also enclosed a copy of the said adoption deed and copy of ration card of Braham Dutt wherein the name of petitioner's

son was very much there. The petitioner also produced the school certificate obtained from the school which also shows that the petitioner's son was shown as adopted son of said Braham Dutt.

After election, the petitioner submitted an election petition on 28.2.2000 and prayed that it may be declared that the petitioner's nomination paper was wrongly rejected and the order of rejection may be declared illegal null and void.

It will be pertinent to mention here that the petitioner who was a candidate for the post of Sarpanch, still the petitioner did not choose to challenge the election of the elected candidate. It is further relevant to mention here that the candidate, who won the election, has not even been impleaded as party respondent in the election petition.

The trial court, after evidence, dismissed the petitioner's election petition on the ground that there is no provision under sub-clause (1) of section 19 read with Proviso (iv) appended to section 19 of the Rajasthan Panchayati Raj Act, 1994 (for short the "Act") which makes the person a qualified candidate to contest the election who had two children before the cut off date and gave one of the children in adoption to another before the cut off date and another issue born to that person after cut off date. Meaning thereby, according to the trial court, the

Proviso (iv) while counting number of children of a person, his all alive children are required to be counted irrespective of the fact that that person has already gave his child to other person in adoption before the cut off date. According to trial court, such exclusion has not been permitted by any provision of law made in the Act.

Explanation to Proviso (iv) only provides that in case the couple has only one children from earlier delivery or deliveries on the date of commencement of this Act and thereafter, any number of children born out of single subsequent delivery shall be deemed to be one entity. Meaning thereby, this provides that in case more children are born to couple by one delivery, then that will not be disqualification even if by that delivery, number of children exceeds from two.

The petitioner is, therefore, aggrieved against the judgment of the trial court dated 26.8.2003.

According to learned counsel for the petitioner, the Law is now well settled by the Division Bench judgment of this Court delivered in the case of Hira Lal vs. State of Rajasthan and others (D.B. Civil writ Petition NO.852/2004). The Division Bench of this Court while considering an almost identical dispute observed that when law recognises adoption and when there is no provision, the legal consequences shall follow. The Division Bench also held that even in cases where the adoption deed is not

registered as the custom governs adoption, then by proving the actual handing over and taking over of the child, adoption can be proved. The Division Bench further held that the Court in that case totally misdirected itself in law by raising a presumption that in the absence of any registered document, adoption is not valid. This mistake was found to be a mistake apparent on the face of the record by the Division Bench of this Court. In view of the Division Bench judgment of this Court, the adopted child given in adoption to someone else in accordance with the law applicable to the parties cannot be included in number of children on or after the cut off date.

The position is now well settled in view of the decision of the Division Bench referred above and a person who has given in adoption any of his children before the cut off date, that children cannot be treated as a children of the person giving out in adoption while considering the qualification of a candidate under Section 19 of the Act.

The law point is in favour of the petitioner and for that there is no doubt. The question is what relief can be granted to the petitioner ? The question in the facts of the case arises is whether the election petition itself is maintainable or not, when the petitioner has not challenged the election of the returned candidate.

In the opinion of this Court, no election petition is maintainable under Rule 80 of the Rajasthan Panchayati Raj

(Election) Rules, 1994 (for short the "Rules") where the election of a successful candidate is not under challenge. Rule 80 of the Rules reads as under :-

"80. Manner of challenging an election under the Act.- An election under the Act or under the Rules may be called in question by any candidate at such election by presenting a petition to the District Judge having jurisdiction within thirty days from the date on which the result of such election is declared, on any one or more of the following grounds:-

- (a) that on the date of election, a returned candidate was not qualified or was disqualified, for such election, or
- (b) that any corrupt practice was committed by a candidate or by any other person with the consent or connivance of the candidate, or
- (c) that any nomination was improperly rejected, or
- (d) that the result of the election in so far as it concern the returned candidate was materially affected
 - (i) by the improper acceptance of any nomination, or
 - (ii) by any corrupt practice committed in the interest of the candidate by a person other than candidate or by a person acting with the consent or connivance of such candidate, or
 - (iii) by improper reception, refusal or rejection of any vote or the reception of any vote which was void, or
 - (iv) by any non-compliance with the provisions of the Act or of these rules, or
- (e) that in fact the petitioner or some other candidate received a majority of the valid votes, or
- (f) that, but for votes obtained by the returned

candidate by corrupt practices, the petitioner or some other candidate would have obtained a majority of the valid votes."

Therefore, the election petition is maintainable only when the election of the elected candidate is challenged.

In an election petition, reliefs can be granted as permissible by Rule 87 of the Rules. Rule 87 of the Rules reads as under :-

"87. Order of the Court.-(1) Upon the conclusion of the hearing the Judge shall make an order:-

- (a) dismissing the petition, or
- (b) declaring the election of all or any of the returned candidates to be void, or
- (c) declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been duly elected.

(2) The Judge, after pronouncing the order made under sub-rule (1) shall send a copy thereof to the District Election Officer (Panchayats) for taking further necessary action in pursuance thereof."

Rule 83 provides that the person whose election is challenged and where the petition claims that any other candidate shall be declared as elected in place of such person, every unsuccessful candidate who has polled more vote than such candidate, shall be made respondent to the petition.

In view of the above, in every election petition, the elected candidate is a necessary party. Obviously the reason is that the Court can pass any of the orders as provided under Clauses of Rule 87 which certainly affects the elected candidate and no order is permissible which will not have affect on the election of the returned candidate. In other words, the election petition cannot be for seeking a mere declaration without questioning the election of the elected candidate as the Rule 87 is not permitting any other order except the orders which are given in the said Rule.

According to learned counsel for the petitioner, civil suit in relation to any election dispute is barred, therefore, the petitioner cannot challenge the wrongful rejection of his nomination paper by filing the civil suit. It is also submitted that the petitioner will not have any remedy to challenge wrongful rejection of the nomination paper of the petitioner. Further, the petitioner will be remedyless and the petitioner shall suffer the same disqualification in future in the next election in view of the finding of the Returning Officer holding that the petitioner is disqualified to contest the election as he has more than two children and one child has born after cut off date.

The apprehension of the learned counsel for the petitioner is absolutely misconceived. The Returning Officer records a decision on nomination paper for a

particular election. The Returning Officer, while exercising the powers under the Act, can decide the fact whether the nomination paper submitted for a particular election is valid or not. The Returning Officer, by doing so, is not deciding the civil rights or status or paternity or question of adoption. The candidate whose nomination paper is rejected by the Returning Officer but not aggrieved against the election of the elected candidate cannot maintain the election petition, therefore, all questions which can be decided under Section 9 of the Code of Civil Procedure by the Civil Courts can be decided by the Civil Courts irrespective of the fact of Returning Officer having limited jurisdiction to decide the issue collaterally while deciding the validity of nomination paper. It is true that in case, the aggrieved party aggrieved against the order of Returning Officer wishes to challenge the election of the elected candidate, he may submit election petition before the Civil Court which may decide the issue as Civil Court which permits granting of relief to the aggrieved party and if that issue is decided by the Civil Court, then that issue may become res-judicata between the parties. Since the decision on the validity of nomination paper only decides the validity of the nomination paper which is before the Returning Officer and nothing more, therefore, in the subsequent election, fresh nomination paper is submitted and the Returning Officer may decide the same question on the basis of the material which are available before the Returning Officer. Therefore, in case, the aggrieved party against the order of the

Returning Officer wishes to challenge the election of the returned candidate, he may get the decision from the Civil Court on the issues decided by the Returning Officer but the election petition cannot be converted into a civil suit for mere declaration in favour of a candidate for election only without having any effect of the decision on question of election, may be in favour or against the returned candidate.

Since the petitioner in this election petition has not challenged the election of the returned candidate, therefore, the election petition is not maintainable and the petitioner is still free to file civil suit for declaration that his son Harsh is the adopted son of Braham Dutt by impleading necessary parties.

In view of the above, the election petition filed by the petitioner itself was not maintainable and, therefore, no relief can be granted to the petitioner despite the fact that the trial court proceeded on wrong proposition of law and contrary to the decision of the Division Bench.

In view of the aforesaid discussion, though the judgment of the trial court cannot be sustained but since no relief can be granted to the petitioner even by setting aside the judgment of the trial court, therefore, this writ petition deserves to be dismissed and hence, dismissed.

(PRAKASH TATIA), J.
S.Phophaliya