

ORISSA HIGH COURT : CUTTACK

W. P.(C) NO. 10721 OF 2008

In the matter of an application under Articles 226 and 227 of the Constitution of India.

Sri Jeetendra Kumar Debata Petitioner

-Versus-

Laxmidhar Pradhan and another Opp. Parties

For Petitioner : M/s. S.S.Das, S.Modi, P.K. Ghose,
Miss. K.Behera & S.Mishra.

For Opp. Parties : M/s. Bharati Bhusan Rath,
P.B.Rath and B.Rath.
(For O.P.No.1)

Decided on 23.02. 2010.

P R E S E N T :

THE HONOURABLE SHRI JUSTICE M. M. DAS

M.M. Das, J.

The petitioner in the present writ petition was elected as a Samiti Member of Talamundali samiti election Zone of Baramba Panchayat Samiti under Baramba Block in the district of Cuttack. The opp. party no. 1, as petitioner, filed an election dispute before the learned Civil Judge (Sr. Division), Athagarh numbered as Election Petition No. 8 of 2007 under section 44-B of the Orissa Panchayat Samiti Act, 1959 (hereafter referred to as 'the Act') praying for declaring the result of the

election published on 24.2.2007 in which the writ petitioner was declared elected, as illegal and void.

2. The case of the opp. party no. 1 was that the writ petitioner filed his nomination paper on 11.1.2007 and he filed the same on 15.1.2007. On 16.1.2007, at the time of scrutiny of the nomination paper, the opp. party no. 1 (election petitioner) raised objection under section 45 (1) (s) of the Act that the writ petitioner is not qualified to contest the election having not completed 21 years of age as on the said date and he mentioned in the nomination paper that he is aged 22 years on the basis of school leaving certificate obtained from Panasapatna Kendra Prathamika Vidyalaya, which is a forged one. It was further pleaded by the opp. party no. 1 - election petitioner that the nomination paper should have been rejected by the Election Officer thereby, he should have been declared elected as an uncontested candidate as the Samiti Member. The writ petitioner, who was the opp. party no. 1 in the election petition, after his appearance in the election dispute filed his show cause/ written statement denying the allegations made in the election petition, more specifically, denying the fact that an objection was filed by the election petitioner before the Election Officer. He also asserted that he was more than 21 years of age at the time of filing of the nomination paper and, as such, prayed for dismissal

of the election petition. The opp. party no. 2 in the election petition, who was the Election Officer also filed a separate show cause denying the allegations of the election petitioner in its entirety and contending, inter alia, that the acceptance of the nomination paper was justified in view of the fact that as per the records available before him, the returned candidate (writ petitioner) was above 21 years of age on the date of filing of the nomination paper. He also refuted the allegation that an objection was filed to the nomination filed by the writ petitioner.

3. On the basis of the rival pleadings, the learned Election Tribunal framed six issues, which are as follows:-

- (i) Is the case maintainable in the eye of law ?
- (ii) Is there any cause of action for the petitioner to bring the case against the O.Ps ?
- (iii) Is the case barred by law of limitation ?
- (iv) Is the election of O.P.1 as Samiti Member of Talamundali Samiti Election Zone of Baramba Panchayat Samiti liable to be declared as illegal and void ?
- (v) Is the petitioner to be declared as the Samiti Member of Talamundali Samiti Zone ?
- (vi) Is the petitioner entitled for any other relief ?

4. During the course of trial, the election petitioner examined himself as P.W. 5 and also proved number of documents marked as Ext.1 to Exts.10. The writ petitioner, who was opp. party no. 1, also examined his witnesses and he himself

produced his horoscope as Ext. A. The Election Officer, however, neither examined any witness nor produced any document. The learned Election Tribunal after hearing the contesting parties, came to a finding of fact that the writ petitioner (opp. party no. 1 before the Election Tribunal) did not attained the age of 21 years as per his matriculation certificate Ext. 9 and, hence, declaring him as elected member of the Samiti is illegal and void. He further held that the opp. party no. 1 - election petitioner should be declared elected for the post of the above Samiti Member. Being aggrieved, the writ petitioner filed Election Appeal No. 19 of 2008 before the learned District Judge, Cuttack under section 44 of the Act. The learned appellate court after hearing the contesting parties dismissed the Election Appeal and confirmed the judgment passed by the learned Election Tribunal.

5. Learned counsel for the writ petitioner vehemently urged before this Court that the learned Election Tribunal could not have thrown out the horoscope produced by him which was marked as Ext. A and could not have given more weightage to the matriculation certificate than to the horoscope while deciding the question of age of the writ petitioner. Though various other points with regard to framing of issues and non-answering each of the issues by the Election Tribunal has been raised by the learned counsel for the writ petitioner, but this Court finds that the moot

question which was to be decided in the election dispute was as to whether the writ petitioner was less than 21 years of age on the date of filing of his nomination paper as provided in section 45 (1) (s) of the Act. Hence, this Court is not inclined to entertain the other contentions raised by the learned counsel for the writ petitioner.

6. Learned Election Tribunal as a finding of fact has noted in the judgment that the writ petitioner filed his school leaving certificate from where the date of birth was found to be recorded as 20.2.1985. It also found that along with the nomination paper, an affidavit was filed by the writ petitioner. The writ petitioner also admitted before the learned Election Tribunal that an application was filed by him before the Election Officer, which has been marked as Ext.5. On the date of filing of the nomination paper wherein he stated that in proof of competency with regard to his present age, he will submit his high school certificate issued by the Board of Secondary Education, Orissa for which he prayed for time. The Election Officer basing on the school leaving certificate accepted the nomination paper of the writ petitioner. A doubt has been raised by the learned Election Tribunal as to why, if the school leaving certificate was accepted by the Election Officer, there was necessity on the part of the writ petitioner to file an application

praying for time to produce his high school certificate (matriculation certificate). The high school certificate (matriculation certificate) has been proved as Ext. 9. The in-charge Headmaster of the school from which the school leaving certificate was obtained by the writ petitioner was also examined as P.W. 4 to produce the school admission register for the year 1990-91. The said in-charge Headmaster stated in his evidence that there was no admission of any student named as Jeetendra Kumar Debata, S/O. Murali Debata of village Talamundali on 10.7.1990 as per School Admission Register and there is no entry vide Serial No. 1734/03 dated 10.7.1990 in the said register vide Ext.1. Copy of the school leaving certificate which was produced by the writ petitioner before the Election Officer was called for and marked as Ext.6. The learned Election Tribunal, therefore, disbelieved the plea of the writ petitioner about the genuinity of the school leaving certificate produced before the Election Officer. In view of the school admission register vide Ext.1 coupled with the evidence of the in-charge Headmaster, the learned Election Tribunal concluded that the said school leaving certificate is a fake one. It was also taken note of that the date of birth of the writ petitioner has been recorded as 22.6.1987 in Ext. 9 (matriculation certificate). The learned Election Tribunal, therefore, relying on the decisions of this Court in the cases of

Chandrakanti Jena v. Banalata Jena and others, 2001 (supplementary) OLR 335 and **Smt. Gitanjali Bisoi v. Smt. Bidutlata Bisoi and another**, 2005 (II) OLR 228 preferred to accept the high school certificate (matriculation certificate) in proof of the correct date of birth of the writ petitioner and came to the conclusion that the writ petitioner was disqualified to contest the election as per the provisions of section 45 (1) (s) of the Act and declared his election as null and void and further declaring the election of the opp. party no. 1 – election petitioner as the duly elected candidate, since there were no other contestants.

7. The learned appellate court after hearing the appeal, finding that the judgment of the learned Election Tribunal is correct, being based on the materials available on record, did not interfere with the same and confirmed the order.

8. The dispute with regard to the date of birth/age of a person has been raised in various cases and dealt with by this Court as well as by the apex Court. In the case of **State of Punjab v. Mohinder Singh**, 2005 AIR SCW 1476, the Supreme Court held that horoscope is a very weak piece of material to prove the age of a person. In most of the cases, the maker of it may not be available to prove that it was made immediately after the birth. To press the horoscope into service that the same is to

be treated as evidence, in terms of section 32 (5) of the Evidence Act, it must be proved to have been made by a person having special means of knowledge as regards authenticity of a date, time etc. mentioned therein. In that context, the horoscopes have been held to be inadmissible in proof of age. On the contrary, the statement contained in the admission register of the school as to the age of an individual on information supplied to the school authorities by the father, guardian or a close relative is more authentic evidence under section 32 (5) unless it is established by unimpeachable contrary material to show that it is inherently improbable. Therefore, the school records have probative value than a horoscope. In the case of *Chandrakanti Jena* (supra), a Division Bench of this Court dealing with a similar dispute requiring adjudication, as to whether the candidate had attained the age of 21 years, confirmed the findings arrived at by the court below, basing on the date of birth mentioned in the matriculation certificate, inter alia, holding that according to the Election Code and the Rules, the matriculation certificate is the basis and foundation of age of a person.

9. The finding that the writ petitioner was disqualified to contest the election having not attained the age of 21 years is primarily a finding of fact and as there is absence of any material before this Court to show that the learned courts

below have committed gross irregularity or illegality or have not taken into consideration any material produced before the learned Election Tribunal or have misconstrued any evidence, which can be termed as a question of law, this Court is of the view that the writ petition involves disputed questions of fact, which cannot be adjudicated in an application under Article 226 of the Constitution of India, even otherwise, there is no error apparent on the face of the impugned orders calling for an interference of this Court by issuance of a writ of certiorari, more so, when it is a settled position of law that a writ Court in a certiorari proceeding cannot act as an appellate court and reassess the evidence/materials adduced/produced before the authority/Court so as to take a different view in the matter.

10. In the result, therefore, writ petition being devoid of any merit is dismissed, but in the circumstances without any cost.

The interim order passed earlier stands vacated and all pending Misc. Cases stand disposed of.

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M.M. Das, J.

*Orissa High Court, Cuttack.
 February 23rd, 2010/Biswal.*
