

ORISSA HIGH COURT : CUTTACK

W. P.(C) NO. 9008 OF 2006

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

Smt. Chhabilata Dei Petitioner

-Versus-

State of Orissa and others Opp. Parties

For Petitioner : M/s. K.Patnaik, K.C.Mishra,
M. Pani & P.C.Moharana.

For Opp. Parties : Addl. Government Advocate
(For O.Ps 1 to 3)
M/s. S.C.Panda & N.K.Behera,
(For O.P.No.4)

Decided on 04.03. 2009.

P R E S E N T :

THE HONOURABLE SHRI JUSTICE M. M. DAS

M.M. Das, J. A notice dated 11.11.2005 was issued by the opp. Party no. 3 – Child Development Project Officer, Begunia, notifying that the Government has created 12 additional Anganwadi centres, out of which, one has been created at village Goti and applications were invited from interested women candidates to be appointed as Anganwadi Worker in the said Anganwadi centre. In response to the said notice, the petitioner, opposite party no. 4 and some other candidates made their applications. The petitioner

has contended that she came to know that she secured 59.35 marks whereas the opp. Party no. 4 secured 60.75 marks. Such mark was allotted to the opp. Party no. 4 by taking into account her service certificate in the voluntary organization in support of her experience by adding five marks. If such five marks would not have been allotted to the opp. Party no. 4, the petitioner would have been selected. The further case of the petitioner is that the appointing authority very well knew that she (petitioner) has submitted her service certificate in support of her experience with regard to her service in a voluntary organization, but the same has not been taken into consideration and no marks have been awarded to the petitioner even though she also possessed experience. The petitioner being aggrieved by the action of the opp. Parties 1 to 3 in not selecting her, preferred writ petition, being W.P. (C) No. 2537 of 2006 before this Court, which was disposed of by order dated 6.3.2006 with a direction to the Collector to look into the grievance of the petitioner as made out in her representation dated 4.2.2006 annexed to the said writ petition as Annexure-3. The Collector was also directed to take a decision as to whether selection of the opp. Party no. 4 was legal or not and, such decision was directed to be taken with reference to the records of the selection, if necessary, by giving opportunity of hearing to the petitioner as well as the opp. Party no.4. Such

decision was also directed to be taken within three months from the date of communication of the order.

2. In accordance with the above order, the Collector, called for the petitioner and the opp. Party no. 4 to attend his office on 21.4.2006, but on that day, the matter was not taken up. Subsequently, the petitioner and the opp. party no. 4 appeared before the Collector, Khurda on 11.5.2006. The petitioner has alleged that in spite of the direction of this Court to dispose of the said representation of the petitioner within three months from the date of communication of the order, the petitioner did not receive any intimation. Being aggrieved by such inaction on the part of the Collector, the petitioner has filed the present writ petition, inter alia, on the ground that the petitioner having also submitted certificate in support of her work in a voluntary organization, should have been awarded 5 marks extra and should have been duly selected as Anganwadi worker instead of the opp. Party no. 4.

3. The opp. Party no. 4 has filed a counter affidavit annexing the copy of the order of the Collector as Annexure-A/4 which was passed pursuant to the order of this Court in the writ petition previously filed by the petitioner. It has been averred in the counter affidavit that in course of enquiry by the Collector, it is revealed that the petitioner has not given any undertaking to produce the experience certificate in her application and, rather,

in the column meant for mentioning past experience, the petitioner had put a cross mark. According to the opp. Party no. 4, the experience certificates annexed to the writ petition as Annexure-3 series, are manufactured documents.

4. This Court, while issuing notice in the present writ petition, by order dated 5.9.2006, called for the records dealing with the appointment of opp. Party no. 4 and directed that the said records shall be kept with the learned counsel for the State, who shall produce the same on the next date. On 26.10.2006, when the matter was taken up, such record was produced before this Court, which indicated that there is an overwriting in one of the pages of the said record and the Registry was directed to keep the said record in sealed cover. The matter was posted to 31.10.2006 on which day, the C.D.P.O. Begunia was directed to remain present in person. On 31.10.2006, the C.D.P.O. appeared before this Court and stated that she was not the C.D.P.O. Begunia at the relevant time when the selection of Anganwadi worker was made.

5. Learned counsel for the State was directed to secure the presence of the officer, who was functioning as C.D.P.O., Begunia during the time of selection of the Anganwadi worker. Ultimately, one Sri Ranjan Kumar Das, appeared before this Court, who was functioning as the C.D.P.O. during the

In the order dated 9.5.2007, this Court directed that Sri Das shall appear before this Court in person to explain as to under what circumstance, there was over writing in the marks allotted to the opp. Party no.4. From the affidavit, it appears that the said question has not been clarified. The document kept in sealed cover was also shown to Mr. Ranjan Kumar Das, who is present in the Court. A prayer is made that a further affidavit shall be filed by him explaining the over writing in the concerned document which is kept by this Court.

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6. As per the above direction, Shri Ranjan Kumar Das was present on 4.7.2007 and it was stated that a show cause affidavit has already been filed. In the show cause affidavit, it is stated that the marks awarded to the petitioner and the opp. Party no. 4 were scrutinized on the date of interview by the committee consisting of the C.D.P.O., Begunia, Vice Charirman, Begunia, S.E.O., Begunia and D.S.W.O., Khurda. The committee decided to award 5 marks to the opp. Party no. 4 for her past experience instead of 3 marks awarded by the C.D.P.O. and, accordingly, the committee recorded a resolution. In

pursuance of such collective decision, the marks have been awarded to the petitioner and the opp. Party no. 4 and after interview was conducted, the proposal for appointment of opp. Party no. 4 was duly approved in the 4th Standing Committee Meeting of the Zilla Parishad, Khurda held on 8.2.2006.

7. This Court has perused the original record dealing with selection of opp. Party no. 4 as well as the order passed by the Collector as at Annexure-A/4 to the counter filed by the opp. Party no.4. On perusal of the original application filed by the petitioner, it appears that the column meant for mentioning the past experience in any Government or Non-Government voluntary organization, has been marked with a cross "X" symbol. The qualification of both, the petitioner as well as the opp. Party no. 4 is H.S.C. The percentage of marks secured in the said examination by both the petitioner and the opp. Party no. 4 has been correctly mentioned. The opp. Party no. 4 having mentioned in her form regarding her past experience and having produced the documents in support of such experience has been awarded 5 marks extra as per the guidelines for selection of Anganwadi worker. The overwriting appearing in the selection list as well as the calculation of marks does not show any incorrect calculation. It is, therefore, presumed that, initially, there being error in calculation, the same has been rectified by correcting the same.

8. At this juncture, Mr. Patnaik, learned counsel drew the attention of this Court to the selection list appearing in page 50 of the File No. 43/05 and page 62 of the Part File of File No. 43/05 and contended that when the selection list was notified in the notice board, the marks secured by the selected candidate in respect of the experience was mentioned as “3”, but in the records maintained in the file, the same has been interpolated to “5” marks. He further submitted that as per Clause – 8 (e) of the guidelines, the marks to be allotted to a candidate for past experience is out of “5” and, as such, each individual member of the committee must have given different marks for the past experience of opp. Party no.4. However, no such document is available in the connected file. He, therefore, submitted that the records have been manipulated to illegally appoint the opp. Party no.4. He further submitted that though members of the interview have given individual marks to the candidates and the average of such marks have been taken as the mark obtained in the interview by each of the candidates, but no such similar procedure has been adopted in course of awarding marks for past experience.

9. On a reading of the guidelines, it appears that in Clause – 8 (e) thereof, it has been stated that marks to be awarded for past experience is out of “5” marks. The experience relevant for

this purpose will be experience in any area of the duties of Anganwadi worker acquired in Government employment or in a Programme under a registered voluntary organization funded by the State/Central Government for this purpose. It is, therefore, clear that the maximum marks that can be awarded for experience is "5". From the record as well as the affidavit filed by the C.D.P.O., it is revealed that the C.D.P.O. awarded initially "3" marks to the opp. Party no. 4 for her past experience, but the selection committee was of the unanimous view that the opp. Party no. 4 should be awarded "5" marks, and, accordingly, the three marks awarded to the opp. Party no. 4 towards past experience was corrected to "5". The contention of Mr. Patnaik that separate marks were to be allotted to a candidate by each of the members of the selection committee for past experience as is done in the interview of the candidate, cannot be accepted as there is nothing in the guideline prescribing as such.

10 This Court, therefore, finds no mistake on the part of the opp. Parties 1 to 3 in selecting the opp. party no.4. as it is clearly evident that she has been rightly allotted with more marks than the petitioner. The stand of the petitioner that her experience certificate has not been taken into consideration cannot be acceded to as she did not produce such certificate along with her application form, though required. Even, it appears from the

record that the Collector in his order dated 9.6.2006 has taken into consideration all aspects of the matter and has dealt with the grievance of the petitioner in detail and arrived at a finding of fact that the petitioner has not submitted the experience certificate nor given any undertaking to produce the same at the time of viva – voce, as mentioned in her grievance petition.

11. Considering all aspects of the matter, no error can be found in the decision of the Collector rejecting the representation of the petitioner. This Court also does not find from the original records produced any error to have been committed in selecting the opp. Party no. 4 as Anganwadi worker of Goti Anganwadi centre.

12. In the result, the writ petition, being devoid of merit, is dismissed. No costs.

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M.M. Das, J.

*Orissa High Court, Cuttack.
March 4th , 2009/Biswal.*

Election to the Office of Sarpanch of Odang Gram Panchayat, which consists of 15 wards, was held on 15.02.2007. The petitioner was returned as the Sarpanch of the said Gram Panchayat in the aforesaid election. The election of the petitioner has been challenged by the opposite party in Election Misc. No.56 of 2007 pending before the learned Civil Judge (Jr. Division), Bhadrak. The grounds set forth in the election petition filed under section 31 of the Orissa Gram Panchayat Act, 1964 are that 12 numbers of votes cast in favour of the election petitioner have been wrongly rejected, three ballot papers one each in Booth Nos.4,5 and 7 have been illegally accepted in favour of the writ

petitioner. Nine persons have voted in Booth Nos.8 as well as Booth No.14 and similarly 5 persons have cast their votes in Booth No.7 of Odang Gram Panchayat as well as in Booth No.1 of Chhyalsingh Gram Panchayat and such persons were supporters of the writ petitioner, who was the opposite party in the election petition. The petitioner on appearing in the Election Misc. Case filed his written statement. After closure of evidence, the opposite party filed a petition on 18.02.2008, inter alia, making a prayer as follows:

- “a) that the counter foils of the ballot papers issued to the votes of booth nos.7,8,11,13,14 of Odang Gram Panchayat who are specifically mentioned in the election petition be marked and the corresponding ballot papers be taken off from the valid ballot papers.
- b) That the ballot papers counted for the opposite party and the rejected ballot papers be inspected, scrutinized and recounted”.

The petitioner filed his objection to the said application. Upon hearing on the application, the learned Civil Judge (Jr. Division), Bhadrak by his order impugned in the present writ petition dated 29.03.2008 allowed the said application observing and directing as follows:-

“In view of the above narrated, I am of the view that for the just decision of the case, prayer made by the petitioner in respect of recounting and inspection recheck of ballot papers and counter foil only is worth considering and as such it is allowed.

Put up on 17.04.2008 when both parties/counsel are to be present in the open court for recounting and inspection and recheck ballot papers and counter foils as prayed”.

The petitioner being aggrieved by the said order has preferred the present writ application seeking quashing of the same. Reliance has been placed on various decisions of the Apex Court as well as this Court by the petitioner in support of his contention that the circumstances did not warrant an order to be passed by the Election Tribunal directing inspection and recounting of ballot papers as has been done in the impugned order.

2. Mr. R.K. Mohanty, learned counsel for the petitioner relying upon the decision in the case of **Vadivelu v. Sundaram and others**, A.I.R. 2000 S.C. 3230 submitted that the facts of the present case do not satisfy the prerequisites conditions where an order for recounting/inspection of ballot papers could have been passed. He vehemently submitted that as has been held by the Supreme Court in the aforesaid decision as well as in the case of **Baldev Singh V. Shinderpal Singh and another**, (2007) 1 SCC 341 to pass an order for inspection/recounting of ballot papers, the Court must be satisfied that a prima facie case has been established, the material facts and full particulars have been pleaded stating the

irregularities for counting of votes. He further submitted that the Supreme Court held in the said case that a roving and fishing inquiry should not be directed by way of an order to recount the votes and in the process, the secrecy of the ballot papers should be guarded. A Division Bench of this Court in Writ Appeal No.67 of 2008 (***Narayan Chandra Nayak Vrs. Harish Chandra Jena and two others***) by judgment dated 04.11.2008 taking note of a number of decisions of the Apex Court as well as this Court, while dealing with a similar question held that the Court has to strike a balance so that the period of election is preserved and remains unpolluted in order to achieve the goal of democracy but at the same time the secrecy of the ballots remains guarded. This Court further held that recounting can be directed in exceptional circumstances where the Court comes to the conclusion that the petitioner is not seeking a roving and fishing inquiry, he has pleaded the material facts and adduced evidence in support of his case and the returned candidate has failed to rebut the same.

3. Law on this question has been well settled and it has been laid down that unless particulars with regard to illegality in counting of ballot papers, rejecting the ballots papers as invalid etc. have been pleaded in detail and evidence has been led in support of such pleading making out a prima facie case in

order, for recounting/inspection of ballot papers cannot be passed.

In the case of ***Harikrishna Lal Vs. Babu Lal Marandi***, (2003)8 SCC 613, the Apex Court held that the success of a winning candidate is not to be lightly interfered with and the burden of proof lies on the one, who challenges the election to raise necessary pleadings and adduce evidence to prove such averments as would enable the result of the election being set aside on any of the grounds available in the law. The secrecy of the ballot must be zealously guarded. In the case of ***R.Narayanan Vs. S. Semmalai***, AIR 1980 SC 206, the Supreme Court held that the fact that the margin of votes by which the successful candidate was declared elected was very narrow, though undoubtedly an important factor to be considered would not by itself, vitiate the counting of votes or justify recounting by the Court. In *Vadivelu* (supra), the Supreme Court while dealing with a case under the Representation of People Act, 1951, referring to several earlier decisions held as follows:

“The result of the analysis of the above cases would show that this Court has consistently taken the view that recount of votes could be ordered very rarely and on specific allegation in the pleadings in the Election Petition that illegality or irregularity was committed while counting. The petitioner who seeks recount should allege and prove that there was improper acceptance of invalid votes or improper rejection of valid votes. If only the Court is satisfied about the truthfulness of the

above allegation, it can order recount of votes. Secrecy of ballot has always been considered sacrosanct in a democratic process of election and it cannot be disturbed lightly by bare allegations of illegality or irregularity in counting. But if it is proved that purity of elections has been tarnished and it has materially affected the result of the election whereby the defeated candidate is seriously prejudiced, the Court can resort to recount of votes under such circumstances to do justice between the parties”.

After holding as above, the Supreme Court, analyzing the pleadings in the election petition, came to a conclusion that the appellant therein has not set forth material facts or particulars required for recounting of votes and to justify his contention that there was irregularity or illegality in the counting, except making some general and bald allegations, no other details were found to be given in the pleadings. In the said case though an allegation was made that electoral roll contained the names of dead persons that the first respondent took advantage of the same and that some persons had impersonated and cast votes in his favour, no details were given as to who committed such irregularities. The appellant therein also did not mention as to how many such votes were cast in favour of the first respondent and has also not alleged the nature of illegality or irregularity said to have been committed by the Counting Officer. It was also not specified as to what manner, there was improper acceptance of invalid votes and improper rejection of valid votes. The Supreme Court, therefore, concluded that the election petition is bereft of all details and the

appellant, while examined as P.W.1 could not supplement anything by way of evidence. (*Emphasis Supplied*). Taking note of the ratio of the several Supreme Court judgments, this Court has also held in the case of Narayan Chandra Nayak (Supra) that it is the solemn duty of the appellant (election petitioner) to plead material facts. The case of illegally accepted or rejected ballot has to be pleaded giving the serial numbers and the source of information. Merely showing that petitioner's agent had told him was not enough. The name of the agent, who had furnished such information was to be disclosed in the election petition itself, note book on the basis of which such details had been furnished must be produced. The above findings were arrived at following the decisions in the case of ***Jitendra Bahadur Singh Vs. Krishna Behari***, AIR 1970 SC 276, ***M. Chinnaswamy Vs. K.C. Palanisamy & Ors.*** AIR 2004 SC 541 and ***Chandrika Prasad Yadav Vs. State of Bihar & Ors.***, AIR 2004 SC 2036. As has been already stated in the present case, election petitioner pleaded the following facts in the election petition in support of his plea that there was irregularity in counting of the votes.

“That during the process of counting the Presiding Officers of different booths illegally rejected 12 nos. of votes caste in favour of the petitioner on flimsy ground of major portions of the cross mark being in symbol ‘sun’ and also that there have been marking in favour of more than one candidates there has been marking on symbols like Sun, Plough and Umbrella in addition to the ‘fish’ symbol of the petitioner. It is humbly submitted that

there has been only two candidates in the election for the post of Sarpanch of Odanga Gram Panchayat. For the whole State of Orissa there has been one set of ballot papers bearing six symbols as per the Orissa Gram Panchayat Election Rules. Names of the candidates are not printed on the ballot papers. The symbols of sun, umbrella, plough and ladder have not been allotted to the any candidates in the election for the office of Sarpanch of Odanga Gram Panchayat. These votes have been wrongly rejected though they should have been counted in favour of the petitioner.

That in three ballot papers, one each in booth nos.4,5 and 7 have been illegally accepted in favour of the O.P. though the major portion of the arrow cross mark is on the symbol 'fish'. These three ballot papers should have been counted in favour of the petitioner but has wrongly been counted in favour of the O.P.

That by such illegalities the O.P. has been declared to have secured 1523 votes and the petitioner have been shown to have secured 1509 votes. In the event of correct and proper inspection of the ballot papers it would be seen that the petitioners has secured 1524 valid votes and the O.P. has secured 1520 votes.

That 10 persons of Odanga Gram Panchayat have been enrolled as voters in both Ward Nos.11 and 13. Similarly 7 persons have been enrolled in Ward no.7 of Odanga Gram Panchayat though they are voters and inhabitants of adjacent Ganijanga Gram Panchayat. Coming to know about this, the agents of this petitioner as well as of other candidates contesting for different offices filed a written objection to the Presiding Officer of Booth no.11 of Odanga Gram Panchayat. Praying him not to allow these voters to cast their votes in Booth no.11 as they have already exercised their franchise in booth no.13 of Odanga G.P. and in Ganijanga Gram Panchayat. A copy of the said application is being filed along with this petition. It is humbly submitted that the Presiding Officer of booth no.11 did not take any step against those voters as a result of which 10 persons have cast their votes in booth no.11 though they have already cast their votes in booth no.13 of Odanga Gram Panchayat. All of them have cast their votes in favour of the Opposite Party in both the booths.

That after the closure of polling the petitioner further came to know that 9 persons of

Odanga Gram Panchayat have cast their votes in favour of the O.P. both in booth nos.8 and 14. Similarly, 5 persons have cast their votes in booth no.7 of Odanga Gram Panchayat though they have also cast their votes in booth no.1 of Chhayalsingh Gram Panchayat. It is humbly submitted that all these persons are supporters of the O.P. and have been canvassing votes for the O.P. All of them have cast their votes in favour of the opposite party”.

4. The pleadings, as quoted above, do not specify as to who are the nine persons of Odang Gram Panchayat, who have cast their votes in favour of the opposite party in the court below (writ petitioner) both in booth nos.8 and 14 and similarly the other five persons, who have cast their votes in booth no.7 of Odang Gram Panchayat have also cast their votes in booth no.1 of Chhyalsingh Gram Panchayat. The source of such knowledge of the election petitioner has also not been disclosed in the pleadings. It has not been specifically stated as to which are the 12 votes which were illegally rejected though they were cast in favour of the election-petitioner. No particulars have been mentioned with regard to the alleged three ballot papers, one each in booth nos.4,5 and 7 which have been illegally accepted in favour of the opposite party in the court below (writ petitioner). In the petition filed for calling for the counter foils of the ballots papers issued to the voters of the booth nos.7,8,11,13,14 of Odang Gram Panchayat and the ballot papers counted in favour of the writ petitioner and the rejected ballot papers for inspection,

scrutiny and recounting. Additional allegations have been made which are not there in the election petition.

5. Considering the pleadings of the election petitioner and in the touch stone of the ratio of the decisions of the Apex Court referred above as well as a Division Bench decision of this Court in W.A. No.67 of 2008 and also applying the ratio of the decision in the case of **Gajanan Krishnaji Bapat Vs. Dattaji Gaghobaji Meeha**, AIR 1995 SC 284, it would be seen that the Election Tribunal has considered facts which are beyond the pleadings of the parties and direction issued in the impugned order that for the just decision of the case there should be recounting of inspection/rechecking of ballot papers and counter foils as prayed for is contrary to the ratio of the decisions in the case of M.Chinnasamy (Supra); Chandrika Prasad Yadav (Supra) as well as the decision in the case of Baldev Singh (Supra). The learned Election Tribunal also without any basis has concluded that the allegation with regard to irregularity in counting of ballots papers has been vividly mentioned in the election petition. In view of such position, the impugned order dated 29.03.2008 passed in Election Misc. Case No.56 of 2007 under Annexure-1 cannot be sustained and the same is accordingly quashed. The Election Tribunal is directed to hear arguments of the parties and dispose of the election petition on the materials available on record within

a period of one month from the date of production of the certified copy of this order before it by any of the parties.

6. The writ petition is accordingly allowed but in the circumstances without cost.

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M. M. Das, J.

Orissa High Court, Cuttack.
February ,2009/Himansu.