

**ORISSA HIGH COURT : CUTTACK**

**W. P.(C) NO. 2967 OF 2008**

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

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Ranjan Acharya @ Ranjan Kumar Acharya ..... Petitioner

-Versus-

Arjun Rout and another ..... Opp. Parties

For Petitioner : M/s. B.H. Mohanty, D.P.Mohanty,  
R.K. Nayak, B. Das,  
T.K.Mohanty, P.K. Swain and  
S.Burma.

For Opp. Parties : M/s. B. Patnaik, P.B. Rath,  
S.K. Swain and B.Rath.  
( For O.P.No.1)

Addl. Government Advocate  
(For O.P.No.2)

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Decided on 21.10. 2009.  
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**P R E S E N T :**

**THE HONOURABLE SHRI JUSTICE M. M. DAS**  
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***M.M. Das, J.***

The petitioner and the opp. party no.1 were candidates for election to the office of the Member of Athagarh Panchayat Samiti from Kumarpur Samity Constituency in the district of Cuttack. The petitioner polled the highest number of votes being 2107, whereas the opp. party no. 1 was in the second run having polled only 129 votes. The result of the election was

declared on 24.2.2007 declaring the petitioner as the duly elected Member of the Panchayat Samiti. The opp. party no. 1 filed Election Case No. 3 of 2007 under section 44-B of the Panchayat Samiti Act before the learned Civil Judge (Senior Division), Athagarh challenging the election of the petitioner. The main ground taken in the election petition was that the petitioner was disqualified from contesting the election, he having begotten three children , the last one having been born on 4.11.1995, i.e., after the cut-off date (21.4.1995). The petitioner, however, took the stand that his third child was born on 26.6.1994, i.e., prior to the cut-off date. During hearing of the election petition, the opp. party no. 1 relied on the entry in the birth register exhibited as Ext.2/1 to prove that the third child of the petitioner was born on 4.11.1995. On the other hand, the petitioner relied on the school admission register (Ext. A) to show that the date of birth of his third son – Deepak Kumar Acharya was 26.6.1992, the relevant entry being Ext. A/6.

2. It is the admitted case of the parties that the first child of the petitioner, namely, Rashmi Rekha Acharya was born on 4.7.1990 and his second child was born on 7.7.1993, the relevant entries in the school admission register being Exts. A/2 and A/4.

3. The learned Election Tribunal while accepting the entry in the birth register as genuine discarded the school admission register on the ground that the present petitioner has not produced the Horoscope, which is the basis of the entry vide Ext. A/6 in respect of the third child of the petitioner. Thus, the Election Tribunal having held that the third child of the petitioner was born on 4.11.1995, i.e., after the cut-off date, the petitioner invited disqualification. On the above finding, the Election Tribunal allowed the election petition and declared the election of the petitioner as void. The petitioner challenged the said order/judgment in Election Appeal No. 1 of 2008 before the learned District Judge, Cuttack and the Election Appeal was dismissed by the appellate court on 22.2.2008. Being aggrieved, the petitioner has preferred the present writ petition under Article 226 of the Constitution, inter alia, contending that the judgments of both the courts below are erroneous, as law with regard to entries in the birth register has been settled that the same is not a conclusive proof of the date of birth and the school admission register is an important piece of evidence which has been illegally ignored by the courts below.

4. Mr. B.H. Mohanty, learned counsel for the petitioner relied upon the decisions in the cases of ***Brij Mohan Singh v. Priya Brat Narain Sinha and others***, AIR 1965 SC

282, **Mayadhar Nayak v. Sub-Divisional Officer, Jajpur and others**, 54 (1982) CLT 265, **Shri Darasongh Kumbhar v. State of Orissa and others**, 2005 (Supp.) OLR 623, **Smt. Gitanjali Bisoi v. Smt. Bidyulata Muduli and another**, 2005 (II) OLR 228, **Basant Kumar Sahoo v. Nrusingha Samal and another**, 2006 (Supp.II) OLR 117, **Nirakar Das v. Gourhari Das and others**, 1995 (I) OLR 526, **Raghunath Behera v. Balaram Behera and another**, AIR 1996 Orissa 38 and **Sankar Kumar and another v. Mohanlal Sharma**, AIR 1998 Orissa 117 in support of his contention that a plaintiff has to establish his own claim and he cannot take advantage of the weakness of the evidence of the defendant. If there is a dispute regarding age in an election petition, the onus is on the petitioner to prove the age, the entries in the birth register are not conclusive, birth certificate marked without objection does not mean that there is a presumption of correctness with regard to the entries made therein and the entries in the school admission register have more probative value.

5. Mr. Patnaik, learned counsel for the opp. party no. 1, on the contrary, contended that the birth and death register being a public document, there is a presumption of correctness attached to the same and it is not necessary to prove as to who made the entries and what was the source of

information. He also relied upon the decisions in the cases of ***Mayadhar Nayak v. Sub-Divisional Officer, Jajpur and others***, (supra), ***Noorjahan Begum v. Life Insurance Corporation of India represented through its Divisional Office, Jeevan Prakash, Cuttack***, 1998 (I) OLR 95, ***Sanjukta Behera v. Rangalata Dalei and others***, 2006 (Supp.I) OLR 746 and ***Ahalya Mangaraj v. State of Orissa and others***, 2006 (II) OLR 411 in support of his aforesaid contentions and also on section 15 of the Registration of Births and Deaths Act, 1969 and Rule 12 of the Rules framed thereunder.

6. It is a well settled proposition of law that it is for the person, who has come to the court against the adversary, to establish the allegations made and it is not permissible for him to prove his case by taking advantage of the weakness of the evidence of the adversary. Hence, no case law is required to be relied upon for this proposition set up by the petitioner.

7. In the instant case, the only question, which is to be determined, is as to whether the learned courts below have acted contrary to law in relying upon the entry in the birth register vide Ext.2/1, which was produced by the election petitioner in coming to the conclusion that the petitioner having been blessed with the third child after the cut-off date has earned disqualification from contesting the election, while

discarding the entries in the admission register vide Ext.A produced by the elected candidate. It is naïve to state that while deciding an application under Article 226 of the Constitution, disputed question of facts are not to be gone into as contended by the learned counsel for the opp. party no. 1. However, the question raised is with regard to acceptance of the entry in the birth register in preference to the school admission register which does not come within the realm of a question of fact. The petitioner in his affidavit filed under Order 18, Rule 4 of the Code of Civil Procedure before the stated, inter alia, that the Register of Births and Deaths produced by the election petitioner is not connected with the child of the petitioner. It does not bear the signature of the informant and is incomplete. The same has not been produced from the proper custody and similarly the birth certificate is a forged one prepared to be used in this case by the election petitioner. From the Register of Births and Deaths marked as Ext.2, which was called for by this Court, it appears that in none of the entries, the signature or L.T.I. of the informant has been put. However, the name of the informant in respect of the entry Ext. 2/1 has been written as “R. Acharya”, but strangely, in the column with the heading “Order of birth (i.e.,) No. of live births including the births registered”, it has been mentioned as “I-living”. Admittedly, all the three children of

the petitioner are alive. It has been brought to the notice of this Court that the register Ext.2 was produced by P.W. 4, who has stated that he works as a Statistical Clerk. Learned counsel for the petitioner drew the attention of this Court to the statement of the said witness given before the election Tribunal wherein he has stated that he is the custodian of the Register Ext.2 and he maintains the same. The said witness stated that he is working in the said capacity as Statistical Clerk since July, 2005. He has admitted that he has not made the entry marked as Ext. 2/1 which does not reveal the name of the informant and that he is unable to state the name of the Register of Births and Deaths of the C.H.C. who has signed in column 24 of Ext. 2/1 and as per column 19, the order of birth mentioned in the Entry Ext.2/1 is their first issue. These aspects have been omitted from consideration by the courts below.

8. In the case of *Brij Mohan Singh* (supra), a five Judges Bench of the Supreme Court observed that an entry of birth made in an official record maintained by an illiterate Choukidar, by somebody else at his request does not come within section 35 of the Evidence Act and with regard to entry of date of birth in the school admission register, the Supreme court in the said case observed that in actual life it often happens that persons give false age of the boy at the time of his admission to a

school so that later in life, he would have an advantage when seeking public service for which a minimum age for eligibility is often prescribed. The court of fact cannot ignore this fact while assessing the value of the entry and it would be improper for the court to base any conclusion on the basis of the entry, when it is alleged that the entry was made upon false information supplied with the above motive.

9. No doubt, such a contingency does not arise in the facts of the present case, but as discussed above, the entry on which the courts below have relied upon, i.e. Ext. 2/1 have not been proved by the election petitioner since the person proving the same had no knowledge as to who made the said entry in the register. Further, there is no signature of the informant in the column meant for the same in the said register.

In the case of *Raghunath Behera* (supra), this Court considering the evidentiary value of an entry made in the school admission register and relying upon the case of ***L. Debi Prasad (dead) by L.Rs v. Smt. Tribeni Devi***, AIR 1970 SC 1286 held that so far as entry in admission register is concerned, such an entry is a very important piece of evidence and it has considerable value because in most of the cases it is in contemporaneous to the date on which adoption is claimed.

In the case of *Smt. Gitanjali Bisoi* (supra), this



Court has evaluated the evidentiary value of the date of birth mentioned in the Horoscope and voters Identity Card vis-à-vis the school admission register as well as the School Leaving Certificate. This Court relying upon a decision of the Supreme Court in the case of ***State of Panjab v. Mohinder Singh***, 2005 AIR SCW 1476 held that the date of birth available in the school admission register has more probative value than the entry made in the voters Identity Card.

10. It is no doubt true that the Register of Births and Deaths under the Registration of Births and Deaths Act, 1969 is a public document and, therefore, can be admitted into evidence without formal report. But, however, any entry made therein is to be proved and no presumption can be drawn with regard to the correctness of such entry.

11. In the instant case, the learned courts below have committed an error in accepting the date as mentioned in the register under Ext.2 and discarding the date mentioned in the school admission register under Ext. A with regard to the date of birth of the third child of the petitioner, more so, on the ground that the said date mentioned in the school admission register cannot be accepted as the Horoscope, which was stated to be the basis of entry of such date was not produced. In the facts of the case, on the face of the documents produced by the respective

parties, the probative value of the entry made in the school admission register under Ext. A definitely tilts the case in favour of the writ petitioner.

12. This Court, therefore, finds it to be a fit case to be interfered with in exercise of its plenary jurisdiction under Article 226 of the Constitution and accordingly, quashes the judgment dated 22.12.2007 passed in Election Case No. 3 of 2007 and the judgment dated 22.2.2008 passed in Election Appeal No. 1 of 2008 under Annexures- 1 and 2 respectively.

13. In the result, the writ petition is allowed, but in the circumstances without cost.

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**M.M. Das, J.**

*Orissa High Court, Cuttack.  
October 21st , 2009/Biswal.*





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