

**HIGH COURT OF ORISSA: CUTTACK****W.P.(C) No. 16460 of 2012**

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

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Chelli Damodar Dasu Naidu,  
Son of Chelli, Vill/PO: Saradhapur,  
GP: Saradhapur, PS: Paralakhemundi,  
Dist: Gajapati.

... Petitioner

-Versus-

B.D.O.-cum-Election Officer, Saradhapur  
Gram Panchayat, AT/PO: Gossani,  
PS: Parlakhemundi, Dist: Gajapati & another

... Opp. Parties

For Petitioner : M/s. J.R.Dash, K.L.Dash  
& S.K.Ratha

For Opp. Parties : M/s. Prasanna Kumar Mishra  
& S.K.Dash  
(for Caveator-O.P. NO.2)

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P R E S E N T:

**THE HONOURABLE SHRI JUSTICE B.N.MAHAPATRA**

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Date of Order: 19.10.2012  
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**B.N.Mahapatra,J.** This Writ Petition has been filed with a prayer to quash Order dated 24.08.2012 (Annexure-3) passed by the Civil Judge (Junior Division), Paralakhemundi (for short, 'Election Tribunal') in Election Petition No.06/2012 by which the petitioner's prayer to appoint an Advocate Commissioner for examination of the petitioner as a witness has been rejected.

2.           Petitioner's case in a nutshell is that petitioner, opposite party No.2 and another person, namely, Chakradhar Barik contested for the office of 'Sarapanch', Saradhapur Gram Panchayat for which nomination was filed during the period from 7<sup>th</sup> to 12<sup>th</sup> January, 2012. At the time of scrutiny of nominations, opposite party No.2 objected to the acceptance of the nomination of the petitioner on the ground that he is not able to read and write Odia. Further, the said objection could not sustain and ultimately the polling took place on 11.02.2012 and the final result was declared on 21.02.2012. The present petitioner was declared elected by a margin of 245 votes and opposite party No.2 polled votes next to the petitioner. Challenging the election of the present petitioner as Sarapanch, opposite party No.2 filed Election Dispute under Section 30 of the Grama Panchayat Act, before the Civil Judge (Junior Division), Paralakhemundi bearing Election Petition No.06/2012 which was proceeded according to law. While the proceeding was continuing in the Court below, the petitioner filed a petition under Section 37(g) of Orissa Grama Panchayats Act read with Order 26, Rule 1, CPC for appointment of Advocate Commissioner for examination of the petitioner on the ground of his ailment, who was advised to take bed rest for a period of 45 days by his treating Physician. Petitioner submitted OPD ticket in support of his illness before the Court below. Because of problem in his spine, the petitioner was unable to sit and stand. Therefore, a prayer was made for appointment of Advocate Commissioner for examination of the petitioner. To the above petition, an objection was filed by opposite party

No.2 specifically saying that the ground of ailment of the petitioner is false since no doctor is named and further it is confirmed over telephone that no MRI test has been conducted. After hearing both parties, learned Election Tribunal passed the impugned order rejecting the petitioner's prayer for appointment of Advocate Commissioner for examination of the petitioner. Hence, the present writ petition.

3. Mr.J.R.Dash, learned counsel appearing for the petitioner submits that the learned Tribunal has erred in rejecting the petitioner's petition by not accepting the medical certificate (Annexure-1) which is a public document issued by a Medical Officer of the Government Hospital. As per the usual practice, the medical certificate contains the signature of the treating doctor. Law requires that the petition must be supported by an affidavit. Since the petitioner was taking bed rest because of his illness he was not in a position to come and swear the affidavit. Therefore,, the affidavit has been sworn in by his relative Ramakrishna Rao. As per the medical ticket (Annexure-1), the petitioner was advised for six weeks' rest and not for six days as observed by the lower Court. Paralakhemundi is situated at a distance of more than 20 kilometres from petitioner's village. Therefore, the lower Court is not justified to hold that Paralakhemundi is situated at a little distance. No MRI facility is available at Prarlakhemundi. It is only available at Vijaynagaram or Berhampur. If the Commissioner is deputed, the petitioner is willing to bear the cost. Therefore, opposite party will in no way

be prejudiced. As per the usual practice, an Advocate Commissioner is deputed in the interest of justice and to avoid delay in the proceeding.

4. Mr.P.K.Mishra, learned counsel appearing for opposite party No.2 submits that there is no infirmity and illegality in the order of the learned Tribunal. The petitioner being the returned candidate is a vital witness and the allegation in the writ petition is that he is disqualified to be a member of the Grama Panchayat as he does not know how to read and write Odia. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of *Mohit Kumar v. Dato Mohan Swami*, AIR 2004 SUPREME COURT 3682, Mr.Mishra submitted that the judge may liberally exercise his power of recording evidence on commission except material witnesses as per discretion of Court. Further placing reliance on the judgment of this Court in the case of *Manoranjan Panda Vs. Sailendra Narayan Praharaj and another*, 2010 (supp.-1) OLR 968, he submitted that when the Trial Court considered the materials before it regarding illness of opposite party No.1 (present petitioner) and it was not satisfied that the said witness should be examined on commission, this Court was not inclined to interfere with the same. Further placing reliance on the decision of the Calcutta High Court in the case of *Octovious Steel and Co. ltd. Vs. Endogram Tea Co. Ltd.*, AIR 1980 CALCUTTA 78, Mr. Mishra submitted that the Court cannot act on medical certificate unless it contains the name of the disease, the condition of the patient and other relevant particulars on the basis of which the Court can come to a finding that it would be risky for the patient to attend the Court.

5. On the rival contentions taken by the parties, the only question that falls for consideration by this Court is as to whether the order passed by the Civil Judge (Junior Division), Paralakhemundi under Annexure-3 rejecting petitioner's prayer for appointment of Advocate Commissioner is justified.

6. Petitioner's case is that he is suffering from spine problem and advised by the doctor to take bed rest. Therefore, he made a petition under Section 37(g) of the Orissa Grama Panchayat Act read with Order 26, Rule 1, CPC for appointment of Advocate Commissioner for examination of the petitioner. The said petition was rejected by the Trial Court on following grounds.

- (i) Petition under Order 26, Rule 1, CPC has been filed supported by an affidavit which has been sworn in by one of the relatives of the writ petitioner, i.e., Ramkirshna Rao, but not by the present petitioner and the affidavit does not reveal as to how Ramkrishna Rao is related to the petitioner;
- (ii) No medical certificate as required under Order 26, Rule 1, CPC, explanation has been filed in support of ailment of petitioner. On the other hand, OPD ticket of District Headquarters Hospital, Paralakhemundi has been filed which does not reveal the name of the medical practitioner;
- (iii) Petitioner has not specifically mentioned the ailment he is suffering from nor he has mentioned the name of the doctor who is treating him;
- (iv) Petitioner has not undertaken MRI test nor he is treated as an indoor patient;

- (v) The OPD ticket produced reveals that the petitioner is advised to take bed rest for six days;
- (vi) Petitioner is a resident of village Saradhapur, which is at a little distance from Paralakhemundi;
- (vii) The ailment as mentioned in the OPD ticket is of Sciatica, which is not a major disease;

7. Under Order 26 Rule 1, CPC power is vested with Civil Court to issue a Commission for the examination on interrogation or otherwise of any person resident within the local limits of its jurisdiction, who is exempted under CPC from attending Court or who is, suffering from sickness or infirmity, unable to attend it. Proviso says that such Commission shall not be issued unless the Court for reasons to be recorded thinks it necessary to do so. Explanation to Order 26, Rule 1, CPC envisages that the Court may, for the purpose of the this rule, accept a certificate purporting to be signed by the medical practitioner as evidence of sickness or infirmity of any person, without calling the medical practitioner as a witness.

8. Hon'ble Supreme Court in the case of Mohit Kumar (supra) held as follows:-

“The Court may liberally exercise his power of permitting recording of evidence on Commission excepting for such witness who are very material and who the learned Judge, in his discretion, feels necessary must appear before him that the demeanour of any witness may need to be watched.”

9. This Court in the case of **Sankar Narayan Naik Vs. State of Orissa**, AIR 1967 ORISSA 203 held as follows:-

6. One significant principle must be borne in mind in deciding a question of this nature. Ordinarily witnesses are to be examined in court. The reason is obvious. The trial court must assess the truth or otherwise of the versions of the witnesses by taking into consideration the demeanour and the conduct of such witnesses while deposing in court. The court is deprived of this opportunity when they are examined on commission. This is the reason why examination on commission would not be allowed unless a case is strictly made out as provided for under Order 26 Rule 4.”

10. In the instant case, the petitioner suffers from Sciatica as mentioned in OPD ticket. In the OPD ticket bed rest has been advised to the petitioner. From such OPD ticket (Annexure-1), it does not reveal that the petitioner cannot move. Had it been so, the patient would have been treated as an indoor patient. Had the ailment been very serious, the petitioner must have gone for MRI test. No medical certificate purporting to be signed by medical practitioner as evidence of sickness and infirmity has been filed as required under Order 26, Rule 1, CPC. Only OPD ticket has been filed. The OPD ticket dated 18.08.2012 (Annexure-1) does not reveal as to whether the petitioner has been advised for bed rest for six weeks or six days. The OPD ticket is of 18.08.2012. Assuming that the treating doctor advised bed rest for six weeks, the same expires in 1<sup>st</sup> week of October. The exact health condition of the patient does not reveal from the OPD ticket. Therefore, learned Election Tribunal has not believed that the disease of the petitioner is so serious that he could not be able to attend the Court which is situated at a distance of 20 kilometres from his residence.

11. Further, it is not in dispute that the petitioner is a vital witness. Perusal of the impugned order reveals that the learned Election Tribunal after taking into consideration every aspect of the case came to the conclusion that the petitioner is not completely bedridden and accordingly rejected the petition filed by the petitioner under Order 26, Rule 1, CPC read with Section 37(g) of the Grama Panchayat Act and directed him to remain personally present to adduce his evidence in the Court on 21.08.2012 without fail. For the reasons stated above, this Court does not find any infirmity or illegality in the impugned order passed by the learned Tribunal.

12. Law is well-settled that appellate Court/writ Court should not interfere with the finding of facts recorded by the Court below unless there are compelling circumstances (see *Jaenendrakumar Phoolchand Daftari v. Rajendra Ramsukh Mishra and others*, AIR 1994 SC 586).

13. In the fact situation, this Court is of the view that it is not a fit case where interference of this Court in exercise of its extra-ordinary power under Article 226 of the Constitution of India is called for.

14. In the result, the writ petition is dismissed.

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**B.N.Mahapatra, J.**



