

ORISSA HIGH COURT: CUTTACK.

W.P.(C) NO. 3356 OF 2008

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

Sansari Nayak Petitioner

-Versus-

Dalimba Dei @ Naik & three others Opp. parties

For Petitioner : M/s. S.K. Mishra, M.R. Dash,
S.K. Samantaray and
A. Kejriwai.

For Opp. Parties : M/s. N. Sahani & K. Pradhan
(For O.P. 1)
Addl. Government Advocate
(For O.P. 4)

Date of Judgment: 30.01.2012

PRESENT :

THE HONOURABLE SHRI JUSTICE M.M. DAS

M. M. Das, J. The petitioner in this writ petition has challenged the order dated 27.2.2008 passed by the learned Addl. District Judge, Nayagarh in Election Appeal No. 1 of 2008 dismissing the said appeal and thereby confirming the judgment dated 14.1.2008 passed by the learned Civil Judge (Junior Division), Nayagarh in Election Misc. Case No. 17 of 2007. The Election Tribunal in the said election petition while allowing the same declared the election of the petitioner as Sarpanch of Narsinghpur Grama Panchayat to be null

and void and further declared the opp. party no. 1 as elected unopposed to the office of the Sarpanch of the said Grama Panchayat.

2. Facts in gist leading to the present writ petition are that, the post of Sarpanch of Narsinghpur Grama Panchayat in the district of Nayagarh is a reserved post for Scheduled Tribe candidate. The present writ petitioner and the opp. parties 1 to 3 contested the election for the said post. On 14.1.2007, the petitioner was declared elected. The opp. party no. 1-Dalimba Dei preferred Election Petition No. 17 of 2007 only on the ground that she belonged to Scheduled Tribe category amongst all the candidates and none other candidates are Scheduled Tribe candidates, therefore, the election of the petitioner to the post of Sarpanch of Narsinghpur Grama Panchayat is required to be declared as null and void and it was further prayed that the opp. party no. 1 be declared elected unopposed for the office of the Sarpanch, Narsinghpur Grama Panchayat. During hearing of the election petition, the present petitioner, who was the opp. party no. 1 in the Election Misc. Case, filed a petition for amendment of his pleadings and challenged the eligibility of opp. party no. 1 (election petitioner) to contest the said election on the ground that she was disqualified to contest the said election as she does not know how to read and write Oriya. The opp. parties 2 and 3 in the Election Misc. Case, who are also opp. parties 2 and 3 in the present writ petition did not contest the said Election Misc. Case. The petitioner also tried to make out a case that the opp. party no. 1 (election petitioner)

married a person called Nalu Nahak and, therefore, by virtue of their marriage, he is no more a member of Scheduled Tribe community. The Election Tribunal on analyzing the materials produced before it, i.e. both oral and documentary, concluded that merely on the basis of the marriage, the caste of a person does not change, it derived support for the above conclusion from the decision in the case of ***Sandhya Theme –v- Devi Kushwah***, 2005 CLT 161 (SC). Thus, it held that the election petitioner (present opp. party no.1) is SABAR by caste and is, therefore, a person belonging to Scheduled Tribe community. With regard to the pleadings as amended by the writ petitioner before the Election Tribunal referring to section 33 of the Orissa Grama Panchayat Act, 1964 (for short ‘the Act’), the learned Election Tribunal held that under no circumstances, a returned candidate can move a petition challenging disqualification of his contestant, who seeks a relief in terms of Section 38 (2) (b) of the Act. The O.G.P. Act does not provide any thing like a counter claim under Order VIII Rule 6-A C.P.C. Further, relying upon the decision in the case of ***Chandrakanti Bhoi –v- The Collector, Bolangir and another***, (2001) C.L.R. 550, the learned Election Tribunal held that the writ petitioner, who was the opp. party no. 1 before it, had no cause of action under the Act to challenge the eligibility of the election petitioner in the said election petition and such a matter cannot be decided in the said election petition. On the above basis, it found that the election petitioner (present opp. party no. 1) should have been declared elected in view of ineligibility of all the other

contestants to contest the said election to the post of Sarpanch, which was reserved for a candidate belonging to Scheduled Tribe. It, therefore, declared the election of the petitioner as null and void and made a further declaration that the opp. party no. 1 herein (election petitioner) is to be declared elected unopposed to the office of the Sarpanch of Narsinghpur Grama Panchayat. The petitioner preferred an appeal against the said judgment and the learned appellate court on taking note of the grounds and reasons given by the Election Tribunal in its judgment and on analyzing the evidence afresh confirmed the said judgment of the Election Tribunal.

3. Be it mentioned here that before the Election Tribunal, the opp. party no. 4 therein, who is the Election Officer of Nayagarh District, filed his pleadings, inter alia, stating that the election petitioner (opp. party no. 1 herein) does not belong to SABAR by caste and does not come under Scheduled Tribe category though he has admitted that the father of the petitioner was a person belonging to SABAR caste. He further admitted that the other two contestants, opp. parties 2 and 3, did not belong to Scheduled Tribe community and after the marriage of the election petitioner to one Nalu Naik @ Nahak, who belonged to Saara, the caste of the election petitioner has changed to the caste of her husband and she is no more a candidate belonging to the Scheduled Tribe community. It was further averred by him that since no person belonging to Scheduled Tribe community contested the election for the post of Sarpanch of the said Grama Panchayat, no illegality or irregularity has been

committed by the Officer-in-charge of the election at the time of scrutiny of the nomination papers in allowing all such candidates to contest the election.

4. Mr. Mishra, learned counsel for the petitioner vehemently urged that so far as the declaration of the election of the petitioner as null and void is concerned, the same is based on surmises and conjectures as it is evident from the materials on record that the opp. party no. 1 never raised any objection with regard to eligibility of the present petitioner to contest the election at the time of scrutiny of nomination papers and as such, she is estopped to raise such objection in the election dispute. He further contended that there being four candidates in the fray, the learned courts below could not have declared the opp. party no. 1 elected in view of the settled position of law. Referring to Section 40 of the Act, he submitted that the court while declaring an election of a particular candidate as void is empowered to declare the person claiming to be declared elected, as the elected candidate subject to the riders fixed in the said provision which is not automatic. In the instant case, from the order sheet of the Election Tribunal, it is disclosed that the petitioner specifically raised the question of eligibility of the present opp. party no. 1 to be declared elected and the opp. party no. 1 also failed to appear before the court for the purpose of subjecting herself to be cross-examined on the question of eligibility. In such view of the matter, he submitted that the impugned judgments are unsustainable in law and are required to be quashed.

5. Learned counsel for the opp. party no. 1, on the contrary, supporting the judgments of the courts below contended that Section 30 of the Act speaks of the election petition questioning the election of a member of a Grama Panchayat, a Sarpanch or Naib-Sarpanch to be presented in accordance with the provisions of the Act. Section 32 of the Act speaks regarding parties to the petition and sub-section (2) thereof prescribes that a person whose election is questioned and where the petition is to the effect that any other candidate is to be declared elected in place of such person, every unsuccessful candidate who has polled more votes than such candidate shall be made opp. party to the petition. He further submitted that a bare reading of the relevant provisions of the Act would go to show that challenging an election by filing an election dispute under the Act is limited to a person who is a contestant in the election and lost and it is not open for the person who got elected and whose election is challenged, to question the eligibility of the election petitioner or any other contestant. Procedure for trial of the election dispute and the power of the Civil Judge (Junior Division) to be exercised under the Act has been envisaged in Sections 35 and 37 of the Act. The O.G.P. Act being a self content Act and having not specifically provided the application of Order VIII Rule 6-A C.P.C. which deals with filing of a counter claim by the defendants in a suit, there was no scope for the writ petitioner, who was the opp. party no. 1 in the Election Misc. Case to make a counter claim with regard to eligibility/

disqualification of the opp. party no. 1 (election petitioner) to contest the election.

6. From the above submissions made by the learned counsel for the respective parties, it is clear that the petitioner has no serious challenge to the part of the judgments of the courts below with regard to the finding that he does not belong to the Scheduled Tribe community and the office of the Sarpanch of Narsinghpur Grama Panchayat was reserved for candidate belonging to Scheduled Tribe community, he was not eligible to contest the said election. Thus, the only other question raised by the petitioner is with regard to the relief granted by the courts below to the opp. party no. 1 by declaring her as the elected Sarpanch of the Grama Panchayat.

As noted above, learned counsel for the opp. party no. 1 has led much trace on his submission that in an election dispute raised under Section 31 of the Act, the elected candidate cannot raise a cross claim with regard to the eligibility of the election petitioner to be declared elected since the provisions of Order VIII Rule 6A C.P.C. is not applicable to such a proceeding. Section 37 of the Act provides the power of the Civil Judge (Junior Division) trying an election dispute under the Act to pass orders, which are vested in a Civil Court under the Code of Civil Procedure when trying a suit, only in respect of (a) discovery and inspection; (b) enforcing the attendance of witness, and requiring the deposit of their expenses; (c) compelling the production of documents; (d) examining witnesses on oath; (e) granting adjournments; (f) reception of evidence taken on affidavit; (g)

issuing commissions for the examination of witness and may summon and examine *suo motu* any person whose evidence appears to him to be material; and shall be deemed to be a Civil Court within the meaning of Sections 480 and 482 of the Code of Criminal Procedure, 1898 (5 of 1898). The Orissa Grama Panchayat Election Rules is silent with regard to applicability of the other provisions of the Code of Civil Procedure to an election dispute under the Act. However, when the Civil Judge (Junior Division) is vested with a power under Section 38 (2)(b) of the Act to declare another candidate to have been duly elected, it is imperative on the part of the Civil Judge (Junior Division) to examine as to whether the candidate who, according to him, is to be declared to have been duly elected, is eligible to hold the office in question or not.

7. In the instant case, the Election Tribunal, for the above purpose framed a specific issue while trying the election dispute, to the following effect as Issue No. 7, which is as follows:

(7) Is the petitioner entitled to be declared as duly elected Sarpanch of Narsinghpur Grama Panchayat?

8. On analyzing the materials produced and the evidence adduced by the parties before the Civil Judge (Junior Division) on the above issue and taking into consideration the pleading of the present petitioner, introduced by way of amendment during course of trial of the election dispute that the election petitioner (opp. party no. 1 herein) is not eligible to hold the post of Sarpanch, he came to a

finding of fact that the election petitioner (opp. party no. 1 herein) was the only candidate who belongs to Scheduled Tribe community and as all other candidates in the fray of election did not belong to the said community and the office of the Sarpanch to the Narsinghpur Grama Panchayat was reserved for Scheduled Tribe community, the election petitioner (opp. party no. 1 herein) should have been declared as unopposed elected Sarpanch of the Grama Panchayat at the time of scrutiny and acceptance of the nomination papers by rejecting the nomination of the petitioner as well as the other contestants in accordance with Rule 31 of the Orissa Grama Panchayat Election Rules. Thus finding, he granted the relief to the opp. party no. 1 herein (election petitioner) by declaring her as elected unopposed to the office of the Sarpanch of Narsinghpur Grama Panchayat while declaring the election of the petitioner as null and void. The said finding of fact has been confirmed by the learned lower appellate court.

9. This Court, therefore, finds no error in the impugned judgments passed by the courts below and declines to interfere with the matter.

The writ petition being devoid of merit stands dismissed.

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M.M. Das, J.