

HIGH COURT OF ORISSA: CUTTACK

W.P.(C) No.18465 of 2012

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

Jhiliprava Behera,
W/o. Nandakishore Behera,
Village/PO: Ektali, PS:Bhuban,
District: Dhenkanal

... Petitioner

-Versus-

Bharati Behera & another

... Opp. Parties

For Petitioner : M/s. Samir Ku. Mishra,
J.Pradhan, P.Prusty, D.K.Pradhan,
B.K.Nayak & S.K.Rout

For Opp. Parties : M/s Manoj Ku. Mohanty,
T.Pradhan & M.R.Pradhan
[For O.P. No.1]

P R E S E N T:

THE HONOURABLE SHRI JUSTICE B.N.MAHAPATRA

Date of Judgment: 21.12.2012

B.N. Mahapatra, J. This Writ Petition has been filed challenging the order dated 30.08.2012 passed by the learned Civil Judge (Senior Division), Bhuban (hereinafter referred to as 'Election Tribunal') in Election Misc. Case No.1 of 2012 under Annexure-4, in which the Election Tribunal in the interest of justice, has allowed the two petitions under Annexure-2 series filed by the election petitioner with a direction for examination of two official witnesses, i.e., Medical Officer, C.H.C., Mathakargola and Anganwadi Worker Smt. Mantri of Centre No.1 of Village Ekatali and for production of original documents in their custody as mentioned in the said petitions.

2. Case of the petitioner in a nutshell is that the present writ petitioner is the returned candidate and opposite Party No.1, who is the election petitioner before the Election Tribunal presented Election Misc. Case No.1 of 2012 praying therein to declare the election of the writ petitioner void and to declare her as duly elected candidate to the post of Sarapanch of Ekatali Grama Panchayat under Bhuban Panchayat Samiti. The ground of challenge to the election of the returned candidate to the office of Sarapanch, Ekatali Grama Panchayat is that the petitioner has begotten three children, namely, Sonalika, Sibani and Subbransusekhar on 02.08.2002, 08.05.2006 and 24.12.2009 respectively, i.e. after the cut off date through her husband Nandakishore Behrea. In the course of hearing, the election petitioner was examined as PW-1 and cross-examined. Election Petitioner filed two petitions, one for summoning the Medical Officer, C.H.C., Mathakargola for production of document, such as M.C.A. register, JSY card of third child etc.; and another petition for summoning the Anganwadi Worker of Centre No.1 of village Ekatali for production of documents which were already exhibited on being obtained under R.T.I. Act. The writ petitioner filed objection to those petitions on the ground that relevance of those documents has not been indicated in terms of Order 7, Rule 14, Civil Procedure Code, 1908 and in view of the deposition of PW-1 in cross-examination to the effect that the documents were prepared on the basis of instruction given by her husband in the year 2012 i.e. 24.2.2012 examination of witness is not necessary. It is also stated that the documents vide Ext.1 having been exhibited, further production of the same is not necessary. Therefore, learned Election Tribunal is not justified to allow the two petitions filed by the election petitioner.

3. Mr. S. Mishra, learned counsel appearing for the petitioner submitted that the Election Tribunal without appreciating materials on record and the stands taken in the objection petitions in its proper perspective has erroneously allowed the two petitions filed by the election petitioner. Relevance of summoning the witnesses and production of documents has not been indicated in the petitions.

4. Mr. Mohanty, learned counsel appearing for opposite party No.1 submitted that opposite party No.1 being the petitioner in the election petition filed the documents obtained under the R.T.I. Act along with the election petition. After examination of witnesses two petitions were filed by the election petitioner under Section 37 of the Orissa Grama Panchayats Act, 1964 (hereinafter referred to as 'GP Act') for summoning witnesses and production of documents. Pursuant to the impugned order dated 30.08.2012, summonses were issued to the said authorities and on 05.09.2012 Smt. Mantri, the Anganwadi Worker of Village Ekatali was examined, cross-examined by the present writ petitioner and original documents were exhibited as Ext.2, Ext.2/a, Ext.3, Ext.3/a, Ext.4, Ext.4/a, Ext.5, Ext.5/a, Ext.5/b, Ext.6, Ext.6/a, Ext.6/b, Ext.7, Ext.7/a, Ext.8, Ext.8/a, Ext.8/b, Ext.9, Ext.9/a. Further, the writ petitioner exhibited one document through the said witness which was marked as Ext. A, Ext.A/1. On that very day, the Medical Officer, CHC, Mathakargola produced the documents as called for from his custody. In support of his above contention Mr. Mohanty produced order sheet copy of the Election Misc. Case No.1 of 2012. Therefore, it is submitted by Mr. Mohanty that the impugned order has been complied with and the present writ petition has become infructuous and liable to be dismissed. It was further submitted that the election petition has been filed complying with the provisions of Section 37 of the Act, 1964

and the election petitioner is not required to file election petition as per Order 7, Rule 14 of CPC. Section 37 of the Act, 1964 empowers the Civil Judge (Junior Division) with power which are vested in a Court under Civil Procedure Code, 1908 when trying a suit in respect of matters enumerated in the said Section. Election petitioner, who is opposite party No.1 in the present writ petition filed two petitions in terms of Section 37 of GP Act and the Election Tribunal mentioning the reasons for calling of the witnesses and production of documents passed the impugned order. Therefore, the Election Tribunal has not committed any illegality in allowing the two petitions filed by the election petitioner. Further placing reliance on Section 35(3) of GP Act, it is submitted that the Election Tribunal is empowered to receive so much evidence, oral and documentary, for the purpose of deciding an issue as he considers necessary. Mr. Mohanty submitted that the Election Petition has to be adjudicated within a period of six months, but the returned candidate by filing these petitions is prolonging the proceedings.

5. On the rival contentions advanced by the parties, the following questions fall for consideration by this Court:

- (i) Whether the two petitions filed by the election petitioner to issue summons for appearance of the government officials and production of documents in their possession has any relevance to the issue involved in the Election Petition?
- (ii) Whether the learned Election Tribunal is justified to pass the impugned order allowing the two petitions filed by the election petitioner to summon the government officials and produce documents in their possession?

6. Since both the questions are interlinked, they are dealt with together.

Undisputed facts are that the election petitioner, who is opposite party No.1 in the present writ petition, instituted Election Misc. Case No.1 of 2012 challenging the election of the present writ petitioner as Sarapanch of Ekatali Grama Panchayat as void and to declare her to have been duly elected to the said post. The election petitioner before commencement of hearing, filed documents obtained under the R.T.I. Act. After examination of the witnesses, the election petitioner filed two petitions under Section 37 of GP Act. In one of such petitions, election petitioner has prayed for summoning Medical Officer, C.H.C., Mathakargola to cause production of the original documents and in the second petition, it has been prayed for summoning Smt. Mantri, the Anganwadi Worker, Ekatali Anganwadi Centre for production of the original documents. Now, question arises as to whether examination of the Medical Officer, C.H.C., Mathakargola and the Anganwadi Worker of Ekatali Anganwadi Centre and production of documents in their custody are relevant for adjudication of the issue involved in the election petition.

7. Election petition has been filed challenging the election of the returned candidate on the ground that the returned candidate has begotten three children after the cut off date. Therefore, the returned candidate was disqualified to be elected to the office of Sarapanch, Ekatali Grama Panchayat. In order to prove her case, election petitioner filed the above two petitions under Section 37 of the GP Act. It is the specific case of the election petitioner that she filed documents obtained under R.T.I. Act along with the election petition i.e. before commencement of trial. Further case of the

election petitioner is that she has filed the election petition complying with the provisions of Section 33 of the GP Act which provide regarding the contents of the petition. Therefore, she is not required to file the election petition as required under Order 7, Rule 14, CPC.

It is not the case of the writ petitioner that the election petition has not been filed complying with the provisions of Section 31 read with Section 33 of the GP Act. Law is well-settled that CPC is applicable for trial of the election petition as nearly as possible.

8. Section 35(1) starts with the expression, “subject to the provisions of this Act and the rules made thereunder” every election petition shall be tried by the Civil Judge (Junior Division) as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908. Therefore, if any provision is available under the Grama Panchayats Act and Rules made thereunder there is no need to take aid of CPC. Thus, the provisions contained in the Grama Panchayats Act and Rules made thereunder shall prevail over the provisions/procedure of CPC. [See **Jyoti Basu and others vs. Debi Ghosal and others, AIR 1982 SC 983**]

9. A conjoint reading of Sections 35 and 37 makes it clear that in addition to powers enumerated under Section 37, the Election Tribunal shall apply the other provisions of CPC as nearly as may be subject to provisions of Grama Panchayat Act while trying an Election petition.

10. Apart from the above, Section 37 of GP Act empowers the Election Tribunal with the powers which are vested in a Court under the Code of Civil Procedure when trying a suit in matters, namely, (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). Section 35 (3) of the GP Act also provides that the Civil Judge (Junior Division) shall, for the purpose of deciding any issue receive so much evidence, oral or documentary, as he considers necessary and may require the production of any evidence.

11. In the petition filed under Section 37 of the GP Act it is stated that in the interest of justice the said two petitions were filed for summoning the two government officials for production of official documents. Election Tribunal allowed the two petitions filed under Section 37 of the GP Act by the election petitioner with the following observations:-

“Heard. Perused the case record as well as evidence from the side of the petitioner. Considering the fact and circumstances of this case the documents as mentioned in the schedule of petition the examination of the said witnesses as mentioned in the petitioner filed by the petitioner are required for the interest of justice. The O.P. will not be prejudiced if the document will be called for and if the said witnesses will be summoned and examined. The O.P. will get the opportunity to cross-examined the said witnesses.

Hence in the interest of justice the petition filed by the petitioner is allowed.”

12. In view of the facts of the case and statutory provisions contained in the G.P. Act, I do not find any infirmity or illegality in the

impugned order passed by the Civil Judge (Junior Division) in Election Misc. Case No.1 of 2012.

13. Apart from the above, it is brought to my notice that pursuant to the impugned order dated 30.08.2012, the two witnesses were summoned, examined and cross-examined by the present writ petitioner; the documents mentioned in the petitions were produced in original by the witnesses and they were exhibited as stated above. Moreover, the present writ petitioner has also exhibited one document through the said witness. Since the impugned order has been complied with and the witnesses were examined, cross-examined and documents were produced in original and exhibited, the writ petition has become infructuous.

14. In view of the above, it is not a fit case where interference of this Court in exercise of its extraordinary power under Article 226 of the Constitution of India is called for.

15. In the result, the writ petition is dismissed; but there shall be no order as to costs.

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