

(2006) 06 OHC CK 0031

In the Orissa High Court

Case No : Writ Petition (C) No's. 8183 and 8281 of 2003

Abhimanyu Pradhan

APPELLANT

Vs

Trilochan Rout and Others
 Sri Trilochan Rout Vs
Abhimanyu Pradhan

RESPONDENT

Date of Decision : 20-06-2006

Acts Referred:

Orissa Panchayat Samiti Act, 1959 — Section 16(1), 44A, 44B, 45(1)

Citation : (2006) 102 CLT 621 : (2006) 1 OLR 890 Supp

Hon'ble Judges : P.K. Tripathy, J;A.K. Parichha, J

Bench : Division Bench

Advocate : S.K. Dash, S.K. Mishra, B. Mohapatra and A. Dhalsamant, in W.P.C No. 8183/03 and Bidyadhar Mishra, G. Agarwal, A.K. Beura and M.R. Dash, in W.P.C Nos. 8281/03, for the Appellant; Bidyadhar Mishra, G. Agarwal, A.K. Beura and M.R. Dash, in W.P.(C) No. 8183/03 and S.K. Dash, S.K. Mishra, B. Mohapatra, S. Dash and A. Dhalsamant, in W.P.(C) No. 8281/03, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Tripathy, J.—Abhimanyu Pradhan, petitioner in W.P.(C) 8183 of 2003 and Trilochan Rout, Petitioner in W.P.(C) 8281 of 2003 were two rival candidates contesting for the post of Panchayat Samiti Member from Belipada Samity Constituency under Banki-Dompura Panchayat Samiti. For the sake of convenience Abhumanyu Pradhan is described as the petitioner and Trilochan Rout as Opp. Party No. 1. The said post was notified on 7.1.2002. Nominations were scrutinized on 22.1.2002 and election was held on 27.2.2002. Opp. Party No. 1 was declared elected on securing majority of the votes. At the time of scrutiny of the nominations, petitioner raised objection to the candidature of the Opp. Party No. 1, but such objection was rejected by the Election Officer (Opp. Party No. 2). After declaration of result, petitioner filed Election Misc. Case No. 6 of 2002 before the Civil Judge (Senior Division)-cum-Election Commissioner, Banki in accordance with the provision in Section 44-A read with Section 44-B of

the Orissa Panchayat Samity Act, 1959 (in short "the Act"). Petitioner reiterated the ground of objections challenging to the eligibility of the Opp. Party No. 1 to contest and also alleged about corrupt practice. According to the petitioner, Opp. Party No. 1 while continuing as a sitting member of the said Panchayat Samiti, without resigning from the post filed nomination paper and, therefore, he was disqualified being holding an office of profit, having accepted work order for construction of "Indira Awas", therefore, there was a subsisting contract between him and the Samiti and petitioner (sic.) being indebted to the Banki Central Co-operative Bank failed to repay arrear dues for a continuous period of 2 years and more and on that ground also he was disqualified to contest. Opp. Party No. 1 denied to the allegations of holding office of profit, existence of any subsisting contract and corrupt practice. In reply to allegations of default in payment of arrear loan dues, Opp. Party No. 1 explained that on 17.1.2002 he applied for one time settlement and on 19.1.2002 he was directed by the Co-operative Bank to make payment of Rs. 73,501/- under One Time Settlement Scheme (in short "O.T.S.") and accordingly on the self same date (19.1.2002) he cleared such outstanding dues and, therefore, he is not disqualified to contest for the post of Member of Panchayat Samiti.

2. Both the parties led oral and documentary evidence in support of their respective case. Learned Civil Judge framed as many as 7 issues respectively on (1) maintainability of the case; (2) existence of a subsisting contract; (3) if Opp. Party No. 1 was holding office of profit; (4) if Opp. Party No. 1 was disqualified u/s 45(1)(m-1); (5) did he resort to corrupt practice; (6) was the election in favour of Opp. Party No. 1 was a nullity and (7) to what relief the petitioner is entitled to.

3. On assessment of evidence on record, Learned Civil Judge held that due to damage of petitioner's house in the Super Cyclone, he applied for and obtained the sanction for construction of a house under Indira Awas Scheme. Opp. Party No. 1 was the beneficiary. As per the available evidence beneficiaries were paid the amount to undertake the construction by themselves and, therefore, the work order in such a case cannot constitute a contract. Opp. Party No. 1 as a sitting member of the Panchayat Samiti was not paid any salary or remunerations in view of the statutory provision under the Act. So he was not holding any Office of profit. The loan incurred in 1993 having been paid/cleared on 19.1.2002 under O.T.S. Scheme, the disqualification as under Clause(m-I) of Section 45(1) is not attracted. A case of corrupt practice was not proved and accordingly the election of Opp. Party No. 1 cannot be declared as a nullity. Because of the aforesaid finding, Learned Civil Judge held that the case was not maintainable and petitioner was not entitled to any relief.

4. That judgment was challenged by the petitioner in the Court of District Judge, Cuttack in Election Appeal No. 13 of 2002. As noted in the impugned judgment, the sole point which was canvassed before the Appellate Court was relating to disqualification of the petitioner under Clause (m-1) of Section 45(1) of the Act.

Learned District Judge considered rival submission of the parties and the undisputed factual finding recorded by the Trial Court to the effect that as against the loan taken by Opp. Party No. 1 in 1993, Dispute case No. 47 of 1998-99 was decreed by Assistant Registrar, Co-operative Society on 30.10.1998 for Rs. 89,347/-and Execution Petition No. 175 of 2000-01 was initiated to realise the decretal dues together with interest and on the basis of O.T.S. and payment in that respect made on 19.1.2002, the loan file of the Opp. Party No. 1 was closed on 18.6.2002. Learned District Judge accepting the interpretations of law made by the petitioner held that the aforesaid fact situation proves default in payment of the arrear dues to the Society for a continuous period of over two years and, therefore, on that ground alone the disqualification against Opp. Party No. 1 was enforceable so as to debar him to contest the election or to hold the post even after the election. Accordingly Learned District Judge set aside the judgment of Learned Civil Judge and declared election of Opp. Party No. 1 as invalid. Consequently he declared a casual vacancy.

5. As against the judgment of Learned District Judge, Opp. Party No. 1 filed W.P. (C) No. 8281 of 2003 challenging to legality and correctness of that judgment. Petitioner has filed W.P.(C) No. 8183 of 2003 on the ground that in the Election Petition as well as before the Appellate Court he sought for a declaration that on cancellation of election of Opp. Party No. 1, petitioner being the sole rival candidate be declared elected and that aspect was not considered by Learned District Judge and, therefore, while in seisin of the matter, this Court should pass appropriate direction in that regard.

6. Needless to say that both the writ petition was heard analogously on consent of the parties and are disposed of by this judgment which shall abide the result in both the writ petitions.

7. Contention on issues, which were not raised before the Appellate Court, were also not raised in course of submission before us. Decision rendered by Learned District Judge was only on one point that if the Opp. Party No. 1 became disqualified to contest for his failure to repay the loan amount to the Bank Central Co-operative Bank for a continuous period of over 2 years from the date of decree passed by the Assistant Registrar, Co-operative Society and whether payment made to clear the dues before the date of filing of nominations does not save that disqualification ? In that respect when contention of the Opp. Party No. 1 is that on clearing the loan amount before the date of filing of the nomination he had over come the disqualification under Clause(m-1) and argument of the petitioner is contrary to that. In support of his argument Opp. Party No. 1 relied on the case of Vidya Charan Shukla Vs. Purshottam Lal Kaushik, ; Prakash Khandre Vs. Dr. Vijaya Kumar Khandre and Others, ; Rupadhar Pujari Vs. Gangadhar Bhatra, . The ratio in the said cases is not applicable to the facts and circumstances of the present case.

8. For the sake of convenience, we quote Sub-section (1) of Section 45 of the Act:

45. Disqualification for becoming a member and continuing as a member: (1) A person shall not be eligible to stand for election under Sub-section (1) of Section 16 if he:

- (a) *** ***(b) is not ordinarily residing within the Block; or
- (c) is of unsound mind; or
- (d) is an applicant to be adjudicated as an insolvent or is an indischarged insolvent; or
- (e) is a deaf-mute or is suffering from leprosy or tuberculosis; of
- (f) is convicted of a election offence under any law for the time being in force; or
- (g) is not a citizen of India; or
- (h) is convicted for an offence involving moral turpitude; or
- (i) holds any Office of profit under the State or Central Government or any Local Authority; or
- (j) is a teacher in any school recognized under the provisions of the Orissa Education Code for the time being in force; or
- (k) holds the Office of a Minister either in the Central
or in the State Government; or
- (k-1) as a member of the House of the People or of the Council of States or of the State Legislature; or
- (1) has been dismissed from service of the State of Central Government or any Local Authority; or
- (m) has been in arrears of any tax, fee or rate due by him to any Grama Panchayat for a continuous period of two years; or
- (m-1) being a member of any society registered under the Orissa Co-operative Societies Act, 1951 (Orissa Act II of 1952) has failed to pay any arrears of any kind accrued due by him to such society for a continuous period of two years or more; or
- (n) is in the habit of encouraging litigation in the villagers and has been declared to be so on enquiry by the prescribed authority in the prescribed manner; or
- (o) is interested in a subsisting contract made with or any work being done for the Samity (or any Government) except as a share-holder other than a Director in a Company or except as may be prescribed; or
- (p) is a paid and retained legal practitioner on behalf of the Samiti; or
- (q) is disqualified by or under any law for the time being in force for the purpose of election to the Legislature of the State; or

- (r) is disqualified by or under any law made by the Legislature of the State; or
- (s) is less than twenty-one years of age; or
- (t) is not able to read and write Oriya; or
- (u) has more than two children:

Provided that the disqualification under Clause (h) or (i) may be, removed by the Government in the prescribed manner:

Provided further that the disqualification under Clause (v) shall not apply to a person who has more than two children on the date of commencement of the Orissa Panchayat Samity (Amendment) Act, 1994 or, as the case may be, within the period of one year of such commencement unless he begets an additional child after the said period of one year.

9. It appears from the above quoted provisions that some of the disqualification clauses are not perpetual in nature. In other words some of the disqualification, which have been provided therein, are rectifiable and on removal of the disqualifications/rectifications of the disqualification, such disqualification ceases to operate. For example the disqualification of not residing within the Block ordinarily, insolvency of a person, suffering from specified categories of diseases or physical disabilities, being in arrear of any tax, fee or rate due from Grama Panchayat etc. If the provision of law in Clause (m-1) is read and understood with that sense, then the disqualification for failure to pay arrear on any kind accrued against the candidate and in favour of any Co-operative Society is a curable/rectifiable disqualification. Therefore, the finding recorded by Learned Civil Judge was correct on the basis of pragmatic interpretation of the aforesaid provision. In that respect Learned District Judge committed error of wrong interpretation by importing perpetuity to such disqualification. In the case of Subarna Dibya and Others Vs. State of Orissa and Others, Learned Single Judge of this Court held that:

It is well settled rule of interpretation that the Court while interpreting a rule should as far as possible avoid the construction which attributes irrationality and the Court must obviously prefer a construction which renders a statutory provision constitutionally valid, viable and operative rather than that which makes it void and inoperative.

10. When Opp. Party No. 1 had cleared the dues on 19.1.2002 closing of the loan account in June 2002 is irrelevant inasmuch as on the basis of the agreed O.T.S., petitioner cleared the dues. Therefore, disqualification Clause (m-1) was no more to be enforced against Opp. Party No. 1 after clearing of that arrear dues. Under such circumstance, we set aside the judgment of Learned District Judge and restore the judgment of Learned Civil Judge.

11. In view of the aforesaid decision on merit of the case, claim of the petitioner to declare him elected becomes redundant and, therefore, the writ petition filed

by him is dismissed. We direct the parties to bear their respective cost of litigation in this forum.

A.K. Parichha, J.

12. I agree.