
(2010) 03 OHC CK 0001
In the Orissa High Court

Banabhari Das

APPELLANT

Vs

Bijay Kumar Sahu and Others

RESPONDENT

Date of Decision : 26-03-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Contract Act, 1872 — Section 208

Citation : (2010) 110 CLT 29

Hon'ble Judges : L. Mohapatra, J;B.K. Patel, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. This writ application is directed against the Order Dated 27.2.2010 passed by the Learned District Judge, Ganjam-Gajapati, Berhampur in Election Petition No. 11 of 2008 holding that the Petitioner is disqualified u/s 16(1)(ix) of the Orissa Municipal Act, 1950 (for short "the Act") to be a Councillor of the Notified Area Council, Khallikote (for short "N.A.C") Election Petition No. 11 of 2008 was filed by O.P. No. 1, one of the Councillors of the N.A.C. against the Petitioner & O.Ps. 2 to 5, officials entrusted to the task of conducting elections.

2. Polling for ejection to the Council of the N.A.C. was held on 19.9.2008. For the purpose, nominations were received from 25.8.2008 to 27.08.2008. Declaration of successful candidates was made on 20.09.2008. O.P No. 1 was declared as a Councillor from Ward No. 5 & the Petitioner was declared elected as a Councillor from Ward No. 3. On 30.09.2008 the Petitioner was declared to be the Chairman of the N.A.C. First meeting of the Council was held on 11.11.2008.

3. It was alleged in the election petition that the Petitioner was disqualified for election as a Councillor of the N.A.C. as on the date of filing of nomination he was an advocate appearing against the N.A.C in C.S. No. 17/06 & C.S. No. 3/08 pending in the Court of Addl. Civil Judge (Jr. Division), Khallikote. In his counter-affidavit the Petitioner took the stand that though he was appearing as an Advocate against the N.A.C. in 2 to 3 cases, he gave up the briefs prior to filing

of nomination. The briefs in respect of C.S. No. 17/06 & C.S. No. 3/08 were returned to the clients on 6.8.2008 after which he never took any step in the cases. On the basis of rival pleadings, the Learned Tribunal settled the following seven issues for determination:

- (1) Is the Election Petition maintainable?
- (2) Is there any cause of action to file the Election Petition?
- (3) Is the Respondent No. 1 as a Councillor disqualified within the meaning of Section 16(1)(ix) & Section 17(c) of the Orissa Municipal Act?
- (4) Was the Respondent No. 1 appearing in C.S. No. 17 of 2006 & C.S. No. 3 of 2008 by taking steps, when he filed nomination for NAC Election of Khallikote?
- (5) Whether the Respondent No. 1 had returned the briefs to the parties in C.S. No. 17 of 2006 & C.S. No. 3 of 2008 & disengaged him from the said suits on 6.08.2008?
- (6) Did the Respondent No. 1 appearing C.S. No. 17 of 2006 & C.S. No. 3 of 2008 by taking steps on 25.08.2008 i.e. on the date of filing of the Nomination?
- (7) Is the Petitioner entitled to the relief(s) as prayed for?

In order to substantiate their respective stands, O.P. No. 1 examined three witnesses P.Ws. 1 to 3 & relied upon documents marked Exts. 1 to 6 whereas the Petitioner examined three witnesses O.P.Ws 1 to 3 & relied upon documents marked as Exts. A to D. Learned Tribunal answered issue No. 4 in the negative & issue No. 5 in the affirmative in favour of the Petitioner. So far as issue No. 6 is concerned, it was observed that there was no pleading to the effect that Petitioner appeared & took steps in C.S. Nos. 3/2008 & 17/2006 for which the issue was unnecessary. It was further held that certified copies of order-sheets Exts. 5 & 6 reveal that none of the suits was posted on 25.08.2008. In such circumstances, Issue No. 6 was also answered in the negative.

4. However, in answering issue No. 3 it was held by the Learned District Judge that though there is no satisfactory evidence to hold that the O.P. No. 1 in fact appeared in C.S. Nos. 3/2008 & 17/2006 after 6.8.2008. in view of provision under Order 3 Rule 4(2) of the CPC (for short "the C.P.C.") & the facts & circumstances of the case, it is to be deemed that the Petitioner continued till 12.11.2008 to be the Advocate employed by the Plaintiff in the C.S. No. 3/2008 instituted against the N.A.C, thereby incurring disqualification u/s 16(1)(ix) of the Act Issue Nos. 1 & 3 were also answered in favour of the O.P. No. 1.

5. In assailing the Impugned Judgment it was vehemently argued by the Learned Advocate for the Petitioner that the adjudication of issue No. 3 by the Learned District Judge is not sustainable in law or on facts. It was contended that evidence on record clearly goes to show that the Petitioner continued to be employed by the Plaintiffs in the suits filed against the N.A.C till 12.11.2009 when the Vakalatnamas were filed in Court in order to obtain leave under Order

3 Rule 4(2) of the C.P.C Relying upon decision of Bombay High Court In Lomeshprasad Hariprasad Desai Vs. The State of Bombay, , it was strenuously contended that in interpreting, the provision under the Act, Learned District Judge should have confined himself to determine the actual period of employment as an Advocate. Learned District Judge should not have fallen upon the provision of C.P.C. to infer disqualification u/s 16(1)(ix) of the Act.

6. In reply, it was argued by the Learned Counsel for the O.P No. 1 that though an advocate is an agent of his client, relationship between the advocate & client is not merely contractual. Taking into account the peculiar nature of duties & the status of an advocate vis-a-vis his clients & the Courts, special provision has been made under Order 3 Rule 4(2) of the C.P.C laying down that appointment of a lawyer shall be deemed to remain in force until determined with the leave of the Court by a writing signed by the client. It is further contended that Bombay decision relied upon by the Petitioner does not take note of the peculiar nature of relationship between Advocate & client & the objective behind enactment of provision under Order 3 Rule 4(2) of the C.P.C. Determination of relationship of an advocate & client in a particular case has to be made in accordance with statutory provision. View taken by Bombay High Court renders the provision under Order 3 Rule 4(2) of the C.P.C. redundant & otiose. The Learned District Judge has rightly held that the Petitioner's engagement on behalf of the Plaintiff in C.S. No. 3/2008 continued till 12.11.2008 when fresh Vakalatnama containing endorsement of no objection was filed by the Plaintiff in Court.

7. We have heard Learned Counsel for the Petitioner & O.P No. 1 at length upon reference to impugned judgement & materials produced in course of hearing as well as relevant statutory provisions & reported decisions.

8. It is not disputed that the Petitioner was engaged as a lawyer by Plaintiff in C.S Nos. 3/2008 & 17/2006 instituted against the N.A.C. Nominations for the election were filed between 25.8.2008 & 27.8.2008. Of the three witnesses examined on behalf of the Petitioner, O.P.W. 2 is the Plaintiff in C.S. No. 3/08 & O.P.W. 3 is one of the Plaintiffs in C.S. No. 17/06, O.P.W.1 is the Petitioner himself. Exts. A & C are certified copies of order sheets in C.S. Nos. 3/2008 & 17/2006, Exts. D & E are the receipts showing return of briefs by Petitioner to his clients in C.S. Nos. 17/2006 & 3/2008 respectively. Exts. 4 & 6 are also certified copies of order - sheets in C.S. Nos. 17/2006 & 3/2008 respectively. On analysis of the evidence on record, the Learned District Judge came to a categorical finding that there is no satisfactory evidence to hold that the Petitioner himself appeared on behalf of the Plaintiffs in the two suits even after filing of nomination. However, it is not disputed that Vakalatnama Ext. 2 executed by Plaintiff in C.S No. 3/08 in favour of another lawyer was filed in Court on 12.11.2008. In Ext.2 the executant had put the date "6.8.2008". The Petitioner also had made an endorsement of no objection & signed Ext. 2 putting the date "6.8.2008" below his signature. However, new Counsel appointed by the Plaintiff had put his signature accepting the Vakalatnama mentioning the date

12.11.2008 below his signature. Therefore the no objection endorsement & signature of the Petitioner in Ext.2 simply implied that there was no objection on his part for engagement of any other Advocate by the Plaintiff. On the face of it Ext.2 indicates that the new lawyer accepted the brief from the Plaintiff on 12.11.2008. In such circumstances, Learned District Judge was not inclined to accept the dates put by the Plaintiff on face value. It is also observed that Exts. A & D, receipts of engagement showing return of briefs were never presented before the Court in which the suits were pending. Both the documents were produced in course of hearing of the election dispute.

9. Added to the circumstances narrated above rendering Petitioner's assertion to have returned the briefs to his clients on 6.8.2008 incapable of being accepted, there is no legal basis to support the stand that the employment of the Petitioner as a lawyer on behalf of the Plaintiff in C.S No. 3/08 was determined prior to 12.11.2008.

10. Clause (ix) of Sub-section (1) of Section 16 of the Act reads:

Section 16: xx xx xx No person shall be qualified for election as a Councillor of a Municipality if such person

xx xx xx xx (ix) is employed as a paid legal practitioner on behalf of the Municipality or as legal practitioner against the Municipality.

11. Rule 4 of Order 3 of the C.P.C lays down provisions relating to "appointment of pleader". Sub-rules (1) & (2) thereunder read:

(1) No pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorized by or under a power-of-attorney to make such appointment.

(2) Every such appointment shall be filed in Court & shall, for the purposes of Sub-rule (1) be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be & filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended sofar as regards the client.

xx xx xx

12. In the impugned Judgment itself, Learned District Judge has referred to decisions in All India Reporter Ltd. v. G.D. Moghe and Ors. AIR 1950 Nag 110 & Smt. Maya Devi and Anr. v. Hari Singh 2003(1) SCC 321 (Raj.). In the decisions it was held that Order 3, Rule 4, C.P.C. recognizes power of the Court regarding determination of appointment of Counsel. It is not open to a Counsel to withdraw or to a party to terminate the service of its Counsel without leave of the Court. An Advocate cannot on his own take it to be the determination of his appointment on engagement of another advocate with no objection from him by the client. Where a lawyer desires or wants to relieve himself of his duty as an

advocate he should have to take all care & responsibility to act in accordance with the provisions of Sub-rule (2) of Rule 4 of Order 3, C.P.C. The advocate can withdraw himself from the suit only with the leave of the Court.

13. In the Bombay High Court decision in Lomeshprasad Hariprasad Desai v. State of Bombay AIR 1955 Bombay 159 relied upon on behalf of the Petitioner, a contrary view appears to have been taken. Facts of the case has been narrated in the headnotes as follows:

A was engaged by Baroda Borough Municipality as a pleader in a certain suit. A applied to the Municipality on 18.01.1954 for relieving him as its lawyer & the Municipality passed a resolution on the same day accepting his resignation as its lawyer. On 2.7.1.1954 the Chief Officer of the Municipality intimated to the Court that they had relieved A as their lawyer from 18.01.1954. The nomination papers of A for municipal election were filed on 19.02.1954. The papers were scrutinized on 20.01.1954, when B who was a voter & also a candidate for the election objected to the nomination of A. The objection was overruled & in the election. A was declared elected to one of the seats in the Municipality. B challenged A's election by an application under Article 226 of the Constitution on the ground that he was disqualified as a Councillor by reason of the fact that he was in the employ of the Municipality. Relying upon Order 3, Rule 4, Civil P.C., it was contended that although A had tendered his resignation as a pleader & that resignation was accepted by the Municipality on January but the 27th January, when the letter of the Chief Officer was filed in Court & the Court allowed the pleader to withdraw from the suit.

It was held that in order to decide whether A was in the employ of Municipality or not, the Court must look in at the C.P.C., but to the ordinary law which regulates the contract between master & servant & Judging by that law, there can be no doubt that the employment of A was terminated on 18.1.1954 It was further held that for the purposes of the Municipal Boroughs Act, the Courts were concerned with the actual employment, & if the Pleader was no longer in the actual employment of his client, the mere fact that for the purposes of the C.P.C., his appointment is deemed to continue till the leave is granted by the Court under Order 3, Rule 4, does not bring the case of the pleader within the mischief of Section 12.

14. We respectfully disagree with the view equating the relationship between advocate & his client with that of master & servant taken by the Bombay High Court in the above cited decision. In V.C. Rangadurai Vs. D. Gopalan and Others, , it has been held:

3] xx xx The relation between a lawyer & his client is highly judiciary in its nature & of a very delicate, exacting, & confidential character requiring a high degree of fidelity & good faith. It is purely a personal relationship, involving the highest personal trust & confidence which cannot be delegated without consent.

15. In Vikas Deshpande v. Bar Council of India and Ors. AIR 2008 AC 308 it has

been held:

Relationship between an Advocate & his client is of trust & therefore, sacred.

16. As has been pointed out in *Chengan Souri Nayakam Vs. A.N. Menon*,

That Counsel is not a mere agent of the client would be made clear if we look at the nature of his duties & relationship with public & the Court. Counsel has a tripartite relationship; one with the public, another with the Court, & the third with his client. That is a unique feature. Other professions or calling may include one of two of these relationships but no other has the triple duty. Counsel's duty to the public is unique in that he has to accept all work from all clients in Courts in which he holds himself out as practicing, however unattractive the case or the client. Lord Denning M.R. observed in *Rondel v. Worsely* (1967) 1 QB 443 at p. 502.

"A barrister cannot rid, or choose his clients. He is bound to accept a brief for any man who comes before the Courts. No matter how great a rascal the man may be. No matter how given to complaining. No matter how undeserving or unpopular his cause. The barrister must defend him to the end. Provided only that he is paid a proper fee, or in the case of a dock brief, a nominal fee. He must accept the brief & do all he honourably can on behalf of his client. I say all he honourably can because his duty is not only to his client". All those who practise at the Bar have from time to time been confronted with cases civil & criminal which they would have liked to refuse, but have accepted them as burden some duty. This is the service they do to the public. Counsel has the duty & right to speak freely & independently without fear of authority, without fear of the Judges & also without fear of a stab in the back from his own client. To extent, he is a minister of justice.

17. In *In Re: Mahbub Ali Khan*, it has been held that an advocate engaged in a case owes duty not only to his client but also to the Court. The duties of the advocate are two fold. The advocate by his obligation is bound to discharge his duties to his client with the strictest fidelity & is answerable to the disciplinary jurisdiction of the Court for dereliction of duty. The relation involves the highest personal trust & confidence so much so that it cannot be delegated without consent. A pleader is more than mere agent or servant of his client. He is also an officer of the Court.

18. Statutory provisions u/s 208 of the Indian Contract Act, 1872 also militates against the premises that relationship between an Advocate & his client can be determined unilaterally by one of them or even bilaterally by both or them without leave of the Court. Section 208 of the Indian Contract Act provides that the termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or so far as regards third persons, before it becomes known to them. Order 3 Rule 4(2) of the C.P.C. is an extension of this principle so far as it relates to determination of the authority of an Advocate is concerned. There is absolutely no scope to read the provision u/s

16(1)(ix) of the Act in isolation. Determination of employment or appointment of an Advocate has to satisfy the requirement under Order 3 Rule 4(2) of the C.P.C.

19. For the reason stated above, we are unable to persuade ourselves to interfere with the impugned Judgment. Therefore, the Writ Petition is dismissed.

L. Mohapatra, J.

I agree.