

(2015) 10 OHC CK 0009
In the Orissa High Court
Case No : W.P. (C) No. 18252 of 2014

Banka Bihari Mohapatra

APPELLANT

Vs

Gita Gobinda Patra and Others

RESPONDENT

Date of Decision : 16-10-2015

Acts Referred:

Evidence Act, 1872 — Section 101, 35
Orissa Grama Panchayat Act, 1964 — Section 25(1)(v)

Citation : (2015) 10 OHC CK 0009

Hon'ble Judges : C.R. Dash, J.

Bench : Single Bench

Advocate : Prabir Kumar Ray and A.K. Sethi, for the Appellant; Karunakar Rath, G.K. Nandi and B.A. Barayee, for the Respondent

Final Decision : Dismissed

Judgement

C.R. Dash, J.—What is the date of birth of the petitioner's 4th child namely Jyoti Prakash? Whether it is 23.03.1995 or it is 13.03.1996? The petitioner asserts that the date of birth of his fourth child is 23.03.1995, but opposite party No. 1 who is the election petitioner before the Election Tribunal asserts that it is 13.03.1996.

2. The cutoff date according to the Orissa Gram Panchayat Act, 1964 ("Act" for short) is 21.04.1995 so far as the birth of an additional child is concerned. If the additional child, who may be the third child or fourth child is born before 21.04.1995, then no disqualification is attached to the person under Section 25(1)(v) of the Act, giving birth to such additional child. If the date of birth of such additional child is after 21.04.1995, then the disqualification under Section 25(1)(v) is attracted.

3. Both the Courts below, i.e. learned Civil Judge (Jr. Division), Jaleswar-cum-Election Tribunal in Election Misc. Case No. 1 of 2012 and learned District Judge, Balasore in F.A.O. (Election Misc. Appeal) No. 125 of 2012 have held that the date of birth of the petitioner's fourth child namely Jyoti Prakash is 13.03.1996.

On such ground they have declared the petitioner disqualified under Section 25(1) (v) of the Act and has further declared opposite party No. 1 to be elected, as he was the only contestant for the post of Ward Member of Ward No. 8 of Putina Grama Panchayat in the district of Balasore.

4. The Grama Panchayat Election for the aforesaid post of Ward Member was held on 21.02.2012. At the time of filing of Nomination, opposite party No. 1 objected to acceptance of the Nomination Papers filed by the petitioner on the ground that he has begotten the 4th child after the cutoff date. In spite of such objection however, the nomination papers filed by the petitioner and opposite party No. 1 were accepted and in the election held, the petitioner was declared to be elected.

5. Opposite party No. 1 thereafter filed Election Misc. Case No. 1 of 2012 before the learned Civil Judge (Jr. Division), Jaleswar -cum-Election Tribunal. All the opposite parties including opposite party No. 1 filed their written statement. Learned Election Tribunal framed as many as six Issues, out of which Issue Nos. 3 and 4 are material so far as the date of birth of the petitioner's fourth child Jyoti Prakash is concerned. The present opposite party No. 1, as the petitioner, examined five witnesses including himself as P.W.1. He also exhibited 20 (twenty) documents to prove his case. Out of which, Exts. 13, 13/a, 14, 15, 15/a and 16 are important. The petitioner proved the Register of Admission maintained by the S.R. Mahavidyalaya, Baliapal as Ext. 13 and the relevant entry therein as Exts. 13/a (with objection). The entry in the College Admission Register vide Ext. 13/a was made on the basis of School Leaving Certificate of Jyoti Prakash issued by Loknath High School, Mahagab. That School Leaving Certificate was proved as Ext. 14 by P.W.4, who was the Headmaster of Loknath High School, Mahagab, who also stated that the date of birth of Jyoti Prakash is 13.03.1996 as mentioned in the Admission Register, and the Admission Register has been marked as Ext. 15 and the relevant entry therein has been marked as Ext. 15/a (with objection). P.W.4 in his evidence testified that the date of birth of Jyoti Prakash in the School Admission Register has been made as certified by the Headmaster and that entry was made on the basis of the School Leaving Certificate issued by Kadambini Nodal U.P. School, Bagda, which is marked as Ext. 16 (with objection). Opposite party No. 1 also examined P.W.2, who is a co-villager, who came to know about the date of birth of Jyoti Prakash as 13.03.1996 from the Birthday Celebration of said Jyoti Prakash. Other documents are related to date of birth of other children of the present petitioner, with which I am not concerned.

6. The present petitioner, as opposite party, examined himself as O.P.W.1 and one astrologer as O.P.W.2. He also exhibited the Polio Card of Jyoti Prakash Mohapatra vide Ext. A and Adhar Card vide Ext. B (with objection). Horoscope of Jyoti Prakash was proved as Ext. C by O.P.W.2. He also filed some pages of some Panjikas (almanac) of relevant year regarding date of birth of other three children of the petitioner including Jyoti Prakash.

7. Learned Election Tribunal, taking into consideration the aforesaid evidence and dictum of Hon"ble the Supreme Court in the cases of Brij Mohan Singh Vs. Priya Brat Narain Sinha and Others, , Birad Mal Singhvi Vs. Anand Purohit, , Vishnu @ Undrya Vs. State of Maharashtra, and Satpal Singh Vs. State of Haryana, , and the dictum of this Court and some dictums of Hon"ble the Supreme Court as narrated in page-11 of the judgment of the Election Tribunal, came to a finding that the date of birth of Jyoti Prakash is 13.03.1996 and, therefore, the petitioner is disqualified under Section 25(1)(v) of the Act. Opposite party No. 1 being the only contestant, learned Election Tribunal further declared him to be elected.

8. The present petitioner preferred appeal before the learned District Judge, Balasore. Learned District Judge, Balasore taking into consideration the information obtained by opposite party No. 1 by writing from the concerned P.I.O. of S.R. Mahavidyalaya, Baliapal vide Ext. 1 and 5 and other evidence on record like Exts. 13, 13/a, Exts. 14, 15, 15/a and 16 including the evidence of P.Ws.1, 3 and 4, confirmed the order passed by the learned Election Tribunal. Learned Appellate Court also took into consideration the dictum in the case of Brij Mohan Singh (supra).

9. Learned Appellate Court held that the date of birth in the College Admission Register must have been entered on the basis of the Matriculation Certificate, which has not been proved by any of the parties, and opposite party No. 1 having proved the date of birth of Jyoti Prakash to be 13.03.1996 by cogent evidence, he has discharged the initial burden of proving the fact he had asserted and the burden was shifted to the present petitioner to establish that Jyoti Prakash took birth on 23.03.1995 but not on 13.03.1996.

10. Learned Appellate Court rightly discarded the Polio Card vide Ext. A, because it was not proved by the person who had issued it and the relevant column in which the date of birth had been mentioned was not clear and legible, rather the year of birth noted in the column appeared to have been tampered with. Similarly, the Adhar Card vide Ext. B was discarded by the learned Appellate Court on the ground that it was issued on 16.05.2012 after filing of the Election Petition and it was a post-litigated document. In view of the cogent evidence on record, which were prepared by the prescribed authorities in accordance with the duties enjoined to them by the statutes, the horoscope, etc. which is nothing but a slender piece of evidence, have been rightly taken out of consideration by the learned both the Courts below.

11. Learned counsel for the petitioner submits that the entry in the Admission Register is not the conclusive proof of date of birth of a person, as it is a normal practice that parents usually reduce the age of the child at the time of getting admission in the School so that it would be helpful to him or her in his/her later life when seeking public services, etc.

12. Learned counsel for the petitioner relies on the cases of Brij Mohan Singh

(supra), Birad Mal Singhvi (supra), Pravakar Pati Vs. Ajaya Kumar Das and Another, , Manoranjan @ Manu Prusty and another v. State, (1992) 5 OCR 200 , Golak Chandra Rath Vs. Krutibas Rath and Another, , to substantiate his contention. He also relies on the case of Joshna Gouda Vs. Brundaban Gouda and Another, , to substantiate his contention that in an election dispute the burden to prove the fact that the appellant was born on a particular date rests squarely on the first respondent in view of the provisions contained in Section 101 of the Evidence Act.

So far as the case of Pravakar Pati (supra), Manoranjan @ Manu Prusty and another (supra) and Golak Chandra Rath (supra) are concerned, all the cases have relied on the case of Brij Mohan Singh (supra).

13. In the case of Brij Mohan Singh (supra), question of age of the appellant was in issue. The appellant had asserted that he was born on October 15, 1935, whereas the respondents had asserted that he was born on October 15, 1937. After discussing oral evidence and the documentary evidence including the reasoning supplied by the High Court on the issue of age, Hon''ble Supreme Court proceeded to discuss Ext. 2, Ext. 8 and Ext. 18 adduced in that case, which are Admission Register of Aurangabad Town School, where the appellant had taken admission as a student, the application made by the appellant for the post of Sub-Inspector showing his date of birth and the certificate issued by the Bihar School Examination Board for his passing Matriculation examination respectively. Hon''ble Supreme Court ruled in favour of admissibility of the School Admission Register under Section 35 of the Evidence Act, but refused to accept the date of birth mentioned in the School Admission Register and the certificate issued by the Board of Secondary Examination as correct date of birth, as it was suggested that incorrect statement was made at the request of the person regarding the date of birth of the appellant, who had admitted him to the School. The request was also made, it is suggested, to make him appear two years younger than what he really was, so that later in life he would have an advantage while seeking public service, for which a minimum age of eligibility is prescribed.

18. Taking into consideration all the aforesaid aspects, Hon''ble Supreme Court, in paragraph-20 of the judgment, held thus:--

".....The appellant's case is that once this wrong entry was made in the admission register, it was necessarily carried forward to the Matriculation Certificate and was also adhered to in the application for the post of Sub-Inspector of Police. This explanation was accepted by the Election Tribunal but was rejected by the High Court as untrustworthy. However much one may condemn such an act of making a false statement of age with a view to secure advantage in getting public service, a judge of facts cannot ignore the position that in actual life this happens not infrequently. We find it impossible to say that the Election Tribunal was wrong in accepting the appellant's explanation. Taking all the circumstances into consideration, we are of opinion that the explanation may very well be true and so it will not be proper for the Court to base any

conclusion about the appellant's age on the entry in these three documents vide Ext. 2, Ext. 8 and Ext. 18."

14. The fact in the present case can however be distinguished. The aforesaid presumption regarding the popular tendency cannot be drawn in the present case in as much as all the Schools and Colleges in their Admission Registers have entered the date of birth of Jyoti Prakash as 13.03.1996, those documents have been proved by competent witnesses vide Exts. 13, 13/1, 14, 15, 15/1 and 16. The petitioner in his written statement before the Election Tribunal has not taken any stand that at the time of admission it was suggested to the authority, who was registering the admission, to reduce the age of Jyoti Prakash. There is also no averment to the effect that on anybody's suggestion or opinion the age of Jyoti Prakash was reduced in the School Admission Register and other successive admission registers including the Matriculation Certificate.

15. Hon"ble Supreme Court in the case of Birad Mal Singhvi (supra) in paragraph-14 of the judgment, has held that, if the entry in the School Admission Register regarding date of birth is made on the basis of the information given by parents, the entry would have evidenciary value, but if it is given by a stranger or by someone else who had no special means of knowledge of date of birth, such an entry will have no evidenciary value. In the present case the petitioner, in his written statement filed before the Election Tribunal, has not taken any plea that the admission of Jyoti Prakash was not done by him or his wife, or it was done by some stranger on whose version the date of birth has come to be recorded wrongly. No evidence in this regard has also been tendered by the petitioner as the opposite party before the Election Tribunal.

16. Opposite party No. 1 having proved the fact that the date of birth of Jyoti Prakash is 13.03.1996, his initial burden has been discharged and it was the petitioner, who should have pleaded and proved as to how the date of birth of his fourth child Jyoti Prakash came to be recorded in the School Admission Register as 13.03.1996. Such evidence having not been brought on record, no infirmity can be found in the findings arrived at by the learned Courts below.

17. So far as the case of Joshna Gouda (supra) is concerned, the fact in that case was different and the rulling of the Hon"ble Supreme Court on the fact of that case is not applicable to the fact of the present case. In the case of Joshna Gouda (supra) the Tribunal, Appellate Court and the High Court on the basis of surmises and conjecture, as deposed by the appellant Joshna Gouda, as extracted in paragraph-18 of the judgment, the date of birth of the appellant Joshna Gouda was fixed and in such view of the matter, Hon"ble Apex Court came to hold that the burden to prove the fact that the appellant was borne on a particular date rests squarely on the first respondent. In the present case however the initial burden has been discharged by opposite party No. 1 by proving the date of birth of Jyoti Prakash as 13.03.1996 by cogent evidence. Both the learned Courts below have taken into consideration the case law on the face of the evidence adduced and have come to the findings against the

petitioner.

18. Taking into consideration the discussion supra, I do not feel inclined to interfere so far as the concurrent finding of facts by both the Courts below are concerned. The writ petition is accordingly dismissed.