

(2015) 09 OHC CK 0037
In the Orissa High Court
Case No : Writ Petition (C) No. 11412 of 2013

Bilash Majhi

APPELLANT

Vs

Collector and District Magistrate, Kalahandi and Others

RESPONDENT

Date of Decision : 23-09-2015

Acts Referred:

Orissa Grama Panchayat Act, 1964 — Section 10, 11, 11(a)(i), 25, 25(1)
Orissa Panchayat Samiti Act, 1959 — Section 16

Citation : (2015) 09 OHC CK 0037

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

Bench : Single Bench

Advocate : Suryakanta Dash and H.K. Maharana, for the Appellant

Final Decision : Dismissed

Judgement

C.R. Dash, J—Whether the Collector, in exercise of his power and jurisdiction under Section 26(2) of the Orissa Gram Panchayat Act, 1964 ("the Act" for short) can decide the question of disqualification of a candidate under Section 11(a)(i) of the Act to contest for the post of Sarpanch of a Gram Panchayat, is the sole question that arises for consideration in this writ petition.

2. Petitioner is the elected Sarpanch of Rajpur Gram Panchayat under Junagarh Block in the district of Kalahandi. She impugns the order dated 22.04.2013, Annexure-7, passed by the Collector and District Magistrate, Kalahandi in a suo motu proceeding being numbered G.P. Case No. 4 of 2012, declaring the petitioner disqualified to hold the post of Sarpanch of Rajpur Gram Panchayat.

3. By notification dated 14.12.2011 the State Election Commission, Orissa notified the schedule of the Panchayat Election. According to the said Notification, date of nomination for the post of Ward Member as well as the post of Sarpanch of the Grama Panchayat was fixed from 07.01.2012 to 12.01.2012. The scrutiny of the nomination paper was scheduled to be held on 13.01.2012. The date of publication of the valid nomination list was fixed to 16.01.2012 and

withdrawal of candidature was fixed up to 18.01.2012. In consonance of the schedule in the said notification, the petitioner chose to put her nomination for the post of Sarpanch of Rajpur Gram Panchayat on 11.01.2012. She had also submitted her nomination for the post of Ward Member of Ward No. 9 of Rajpur Gram Panchayat on 12.01.2012. On 13.01.2012 nomination papers were scrutinized and the petitioner was found to be the only valid nominee for the post of Ward Member of Ward No. 9 of Rajpur Gram Panchayat. Hence, she was declared elected uncontested as the Ward Member of Ward No. 9 of Rajpur Gram Panchayat. So far as the post of Sarpanch of the Rajpur Gram Panchayat is concerned, the nomination papers so submitted by the petitioner was also accepted, as it was found to be valid and she contested the election on being allowed by the Election Officer. She was declared elected as the Sarpanch of Rajpur Gram Panchayat upon counting of the votes.

4. While the matter stood thus, the Collector & District Magistrate, Kalahandi vide Notice dated 22.03.2012 called upon the petitioner to show-cause as to why she shall not be declared disqualified to hold the post of Sarpanch of Rajpur Gram Panchayat, she having been elected in contravention of the provisions contained in Section 11(a)(i) of the Act. The petitioner filed her show-cause taking the stand that the petitioner being a rustic "Adivasi" lady, she had no idea about the provision of law; she was declared uncontested for Ward No. 9 of Rajpur Gram Panchayat, her nomination being the only valid nomination filed for the post and she was not conveyed about the statutory restriction to contest for the post of Sarpanch and her nomination was also not rejected and she was allowed to contest for the post of Sarpanch. Learned Collector, after hearing the counsel engaged by the petitioner, held the petitioner to be disqualified by passing the impugned order vide Annexure-7.

5. The petitioner has assailed the order under Annexure-7 on the following grounds:--

"(i) The restriction imposed under Section 11 of the Act has no application to the present case, in as much as there was no occasion for the petitioner to withdraw her candidature after being declared elected uncontested as the Ward Member of Ward No. 9 on the date of scrutiny itself, which is before the schedule date of withdrawal of the nomination. Moreover, her resignation from the post of Ward Member was not accepted on the ground of awaiting publication of result in terms of Rule 52 of the Orissa Gram Panchayat Election Rules, 1968.

(ii) In a proceeding under Section 26 of the Act, the Collector is only empowered to determine and give effect to the disqualification specified in Section 25 of the Act. The present case does not speak of a disqualification, which is one among enumerated in Section 25 of the Act and, therefore, the Collector & District Magistrate, Kalahandi had exceeded his jurisdiction while deciding the case under Section 26 of the Act. In other words, a proceeding under Section 26 of the Act is not at all maintainable for determining the eligibility of a person to stand in an election as a Sarpanch, as envisaged under Section 11(a)(i) of the Act. The stand

of the petitioner is fortified by Sub-section 2(a) of Section 25 of the Act. Hence, if at all any such disqualification is required to be determined, then the only remedy that is available under the Act is a proceeding before the Election Tribunal, seeking relieves in terms of Section 39 of the Act."

6. Counter affidavit has been filed on behalf of opposite party No. 1. It is specifically averred in the said counter that the petitioner after being declared elected uncontested as the Ward Member of Ward No. 9, should not have proceeded to contest the election for the post of Sarpanch. The discrepancy in the election and ineligibility of the petitioner to contest for the post of Sarpanch was taken cognizance of by the State Election Commission, Odisha, which, vide Annexure-A/1 to the Counter Affidavit, advised the Collector to initiate a proceeding under Section 26 of the Act to do the needful. Accordingly, proceeding under Section 26 of the Act was initiated against the petitioner. As per the election schedule the scrutiny of the nomination paper was taken up at about 11 A.M. on 13.01.2012. As there was single nomination of the petitioner for Ward No. 9, she was declared elected uncontested for the post of Ward Member of Ward No. 9 on 13.01.2012. On the same day the nomination paper of the petitioner for the post of Sarpanch was scrutinized and declared as valid. The petitioner contested the election for the post of Sarpanch of Rajpur Gram Panchayat and was declared elected by the Election Officer-cum-B.D.O., Junagarh. As the withdrawal of nomination paper was fixed to 18.01.2012, the petitioner could have withdrawn the nomination for the post of Sarpanch after being declared elected uncontested as Ward Member of Ward No. 9. She could have also withdrawn the nomination before 18.01.2012 so far as the post of Ward Member is concerned, though declared elected uncontested. It is further averred in the counter affidavit that, as per the instruction of the State Election Commission necessary disciplinary proceeding vide D.P. No. 111, dated 09.04.2012 has already been initiated against the erring Election Officer and he has already been suspended vide Letter No. 879/GP dated 09.04.2012. It is further averred that, the Collector has jurisdiction to decide the issue under Section 26(2) of the Act.

7. Learned Additional Govt. Advocate supports the impugned order and submits that the Collector is authorized under Section 26 of the Act to decide the question whether any Sarpanch or Naib-Sarpanch or any other Member is disqualified or has become disqualified. The petitioner being disqualified from the very outset, the question has rightly been decided by the Collector under Section 26(2) of the Act.

8. Remedy for disqualification of a Sarpanch, Naib-Sarpanch or a Ward Member has been provided in Section 26 and Section 30 of the Act. Under Section 26 of the Act, the Collector is the authority to decide the issue; under Section 30 the Election Tribunal is the authority to decide the issue, as outlined in Section 39 of the Act. This Court in the case of Raghunath Sahoo Vs. Collector and District Magistrate and Others, (2008) 1 OLR 230 has held that, simultaneously

proceeding under Section 26 and a proceeding under Section 30 are maintainable. In paragraph-6 however it has been held that, in a proceeding initiated under Section 26 the Collector has to only consider the disqualification, as specified under Section 25(2) of the Act. Such an observation however by this Court in the aforesaid decision is not the ratio of the said case, if the issue in question that was raised before the Court in the aforesaid case is taken into consideration.

9. For convenience in discussion and for ready reference, provisions contained in Sections 26, 25, 11(a)(i) and 39 of the Act are extracted below.

"26. Procedures of giving effect to disqualifications - (1) Whenever it is alleged that any Sarpanch or Naib-Sarpanch or any other member is or has become disqualified or whenever any such person is himself in doubt whether or not he is or has become so disqualified, such person or any other member may, and the Sarpanch at the request of the Grama Panchayat shall, apply to the Collector for a decision on the allegation of doubt.

(2) The Collector may suo motu or on receipt of an application under Sub-section (1), make such enquiry as he considers necessary and after giving the person whose disqualification is in question an opportunity of being heard, determine whether or not such person is or has become disqualified and make an order in that behalf, which shall be final and conclusive.

(3) Where the Collector decides that the Sarpanch, Naib-Sarpanch or any other member is or has become disqualified, such decision shall be forthwith published by him on his notice-board and with effect from the date of such publication the Sarpanch, Naib-Sarpanch or such other member, as the case may be, shall be deemed to have vacated office, and till the date of such publication he shall be entitled to act, as if he was not disqualified."

"25. Disqualification for membership of Grama Panchayat - (1) A person shall be disqualified for being elected or nominated as a Sarpanch or any other member of the Grama Panchayat constituted under this Act, if he -

(a) is not a citizen of India; or

(b) is not on the electoral roll in respect of the Grama or of the ward, as the case may be; or

(c) is of unsound mind; or

(d) is an applicant to be adjudicated as an insolvent or is an undischarged insolvent; or

(e) is a deaf-mute, or is suffering from tuberculosis; or in the opinion of the District Leprosy Officer is suffering from an infectious type of leprosy; or

(f) is convicted of an election offence under any law for the time being in force; or

(g) is convicted for an offence involving moral turpitude and sentenced to

imprisonment of not less than six months unless a period of five years has elapsed since his release or is ordered to give security for good behavior under Section 110 of the Code of Criminal Procedure, 1898 (5 of 1898); or

(h) holds any office of profit under the State or Central Government or any local authority; or

(i) is a teacher in any school recognized under the provisions of the Orissa Education Code for the time being in force; or

(j) holds the office of a Minister either in the Central or State Government; or

(k) has been dismissed from the service of the State Government or of any local authority; or

(l) being a member of a Co-operative Society, has failed to pay any arrear of any kind accrued due by him to such society before filing of the nomination paper in accordance with the provisions of this Act and the rules made thereunder;

Provided that, in respect of such arrears a bill or a notice has been duly served upon him and the time, if any, specified therein has expired; or

(m) is in the habit of encouraging litigation in the Grama and has been declared to be so on enquiry by the Collector in the prescribed manner or by any other authority under any law for the time being in force; or

(n) is interested in a subsisting contract made with or in any work being done for the Grama Panchayat or the Samiti, or any Government except as a shareholder other than a Director in an incorporated company or as a member of a Co-operative Society; or

(o) is a paid and trained legal practitioner on behalf of the Grama Sasan; or

(p) is a member of the Orissa Legislative Assembly or of either of the Houses of Parliament; or

[(q) is a member of the Samiti elected under Clause (h) of Subsection (1) of Section 16 of the Orissa Panchayat Samiti Act, 1959 (Orissa Act 7 of 1960); or]

[(r) is disqualified by or under any law for the time being in force for the purposes of an election to the Legislature of the State; or

(s) is disqualified by or under any law made by the Legislature of the 1[State; or]]

2[(t) is in arrear of any dues payable by him to the 3[Grama Panchayat; or]]

4[(u) has more than one spouse living; or

(v) has more than two children;

Provided that the disqualification under Clause (v) shall not apply to any person who has more than two children on the date of commencement of the Orissa

Grama Panchayats (Amendment) Act, 1994 or, as the case may be, within a period of one year of such commencement; unless he begets an additional child after the said period of one year.]

(2) A Sarpanch or any other member of a Grama Panchayat shall be disqualified to continue and shall cease to be a member, if he -

(a) incurs any of the disqualifications specified in Clauses (a) to (j) 4[Clauses (m) to (p) and Clauses (t) to (v)] of Sub-section (1); or

(b) has failed to attend three consecutive ordinary meetings held during a period of four months commencing with effect from the date of the last meeting which he has failed to attend; or

(c) being a legal practitioner appears or acts as such against the Grama Sasan; or

(d) Being a member of a Co-operative Society has failed to pay any arrears of any kind accrued due by him to such society within six months after a notice in this behalf has been served upon him by the society.

(3) Without prejudice to the provisions of the foregoing Sub-sections, the Sarpanch of a Grama Panchayat shall be disqualified to continue and cease to be the Sarpanch, if he fails to attend three consecutive ordinary meetings of the Samiti, of which he is a member, without the previous permission in writing of the said Samiti.

(4) Notwithstanding anything contained in the foregoing sub-sections-

(a) the State Government may remove any one or more of the disqualifications specified in Clauses (f), (g), (k) and (l) of Sub-section (1);

(b) when a person ceases to be a Sarpanch or Naib-Sarpanch or any other member in pursuance of Clause (g) of Subsection (1) he shall be restored to office for such portion of the term of office as may remain unexpired on the date of such restoration, if the sentence is reversed or quashed on appeal or revision or the offence is pardoned or the disqualification is removed by an order of the State Government; and any person filling the vacancy in the interim period shall on such restoration vacate the office."

"11. Qualification for membership in the Grama Panchayat - Notwithstanding anything in Section 10, no member of a Grama Sasan shall be eligible to stand for election -

(a) as a Sarpanch, if he -

(i) is a candidate for election [* * *] as a member of the Grama Panchayat in respect of any ward; or

xx xx xx

xx xx xx"

"39. Grounds for declaring election void - (1) The 5[Civil Judge (Junior Division)] shall declare the election of a returned candidate void, if he is of the opinion -

(a) that, on the date of his election the candidate was not qualified or was disqualified to be elected under the provisions of this Act or the rules made thereunder; or

(b) that, any corrupt practice has been committed by the candidate; or

(c) that, any nomination paper has been improperly rejected or accepted; or

(d) that, such person was declared to be elected by reason of the improper rejection or admission of one or more votes for any other reason was not duly elected by a majority of lawful votes; or

(e) that, there has been any non-compliance with or breach of any of the provisions of this Act or of the rules made thereunder :

Provided that, in relation to matters covered by Clause (a) the 5[Civil Judge (Junior Division)] shall have due regard to the decision, if any, made under Section 26 before making a declaration under this section.

(2) The election shall not be declared void merely on the ground of any mistake in the forms required thereby or of any error, irregularity or informality on the part of the officer or officers charged with carrying out the provisions of this Act or of any rules made thereunder unless such mistake, error, irregularity or informality has materially affected the result of the election."

10. A cursory reading of Section 25 of the Act shows that the disqualifications specified in Clauses (a) to (j), (m) to (q) and (t) to (v) are disqualifications attached to a person as an individual. In other words, these disqualifications are incurred by a person by his acts, deeds, deformity or disease as an individual. So far as the disqualifications in Clauses (k) and (l) are concerned, these are disqualifications acquired by delinquency and default on the part of the individual, who has filed nomination for election or has been elected despite the disqualifications. So far as the disqualifications in Clauses (r) and (s) are concerned, these are disqualifications under law, which can be said to be present and existing from the very outset and an individual does not have to incur the same by his acts, deeds, deformity, disease, delinquency or default. Disqualifications, as specified in Clauses (r) and (s) are there from the very beginning and holding of office or entry into office by a person, though elected with these disqualifications under law, amounts to usurpation of the office concerned. Clause (b) of Sub-section (2) speaks of disqualifications due to default on the part of a Sarpanch, Naib-Sarpanch or a Ward Member in attending three consecutive ordinary meetings held during a period of four months commencing with effect from the date of the last meeting. Clause (c) of Subsection (2) speaks of misdemeanor on the part of a Member, who is a legal practitioner to appear or acts as such against the Grama Sasan. Clause (d) of Sub-section (2) speaks of default on the part of a Member, Sarpanch or Naib-

Sarpanch, who is a member of a co-operative society. Sub-section (3) speaks of default on the part of the Sarpanch of a Grama Panchayat in not attending three consecutive ordinary meetings of a Samiti, of which he is a member.

11. Learned counsel for the petitioner harps heavily on Sub-section (2)(a) of Section 25 and submits that the Collector, in exercise of his power under Section 26(2) of the Act, can only decide questions relating to disqualifications specified in Clauses (a) to (j), Clauses (m) to (q) and Clauses (t) to (v) of Sub-section (1). A Sarpanch or a Naib-Sarpanch of a Grama Panchayat cannot be held to be disqualified to continue and shall not cease to be a member on any other ground by the Collector except the disqualifications specified in Clause (a) of Sub-section (2) of Section 25.

12. Such a submission by the learned counsel for the petitioner is wholly misconceived in as much as the key word with which Clause (a) of Subsection (2) of Section 25 begins is the word "incurs". The word "incur", as defined in Merriam - Webster Dictionary, is "to cause oneself to have or experience (something unpleasant or unwanted)". To become liable or subject to bring down upon oneself. Origin of the word is from the middle English "incurren", derived from latin "incurrere", which literally means "to run into".

13. As I have discussed supra, the disqualifications specified in Clauses (a) to (j), (m) to (q) and (t) to (v) are disqualifications which are incurred by a person as an individual by his acts, deeds, deformity or disease. The disqualification might be there before the election or the same might have been incurred after assuming office, as the case may be.

14. Clause (a) of Sub-section (2) of Section 25 only specifies that, if the aforesaid disqualifications specified in Clauses (a) to (j), Clauses (m) to (q) and Clauses (t) to (v) are incurred, a Sarpanch or any other Member of the Grama Panchayat shall be disqualified to continue and shall cease to be a Member. That does not mean that disqualifications specified in Clauses (k), (l), (r) and (s) cannot be decided by the Collector, because Section 25 in no express terms limit the power of the Collector to the disqualifications specified in Clause (a) of sub-section (2) of Section 25 of the Act only. Disqualifications specified in Clause (k) and (l) are occurred by delinquency and default on the part of an individual. If those delinquencies and default are alleged, the Collector has the necessary power to decide the issue of disqualification. So far as disqualifications under Clauses (r) and (s) are concerned, those are disqualifications under law. If those disqualifications are attached to an individual, he is debarred from filing nomination and contesting the election. If those disqualifications are raised before the Collector, those questions can also be decided by the Collector under Section 26 of the Act.

15. My above view is fortified by the provisions contained in Subsection (1) of Section 25, which unequivocally states that a person shall be disqualified for being elected or nominated as a Sarpanch or any other Member of the Grama

Panchayat constituted under this Act. The Collector is authorized under Section 26 of the Act to decide even the question of illegal and improper nomination and not only the question of disqualification that has been incurred after the election or before the election.

16. Clause (s) of Section 25(1) clearly states that, if a person is disqualified by or under any law made by the Legislature of the State, that amounts to a disqualification. In the present case, the petitioner is disqualified by Section 11(a) (i) of the Act and his disqualification comes under Clause (s) of Section 25(1). The power vested in the Collector under Section 26 of the Act and conspectus of the discussion supra regarding disqualifications specified in each of the Clauses (1), (2) & (3) of Section 25 quoted supra clearly shows that the Collector has the power to deal with the question of disqualification specified in all the Clauses of Sub-sections (1), (2) & (3). However, the State Government, in Sub-section 4 (a) has been empowered to remove any one or more of the disqualifications specified in Clause (f), (g), (k) & (l) of Sub-section (1).

17. Perusal of Sub-section (1) of Section 25 and Clause (a) of Subsection (1) of Section 39 shows that both the Collector and the Election Tribunal can go into the question of improper and illegal nomination and the question of disqualification. Sub-section (1) of Section 26 puts emphasis on the words - "whenever it is alleged that any Sarpanch or Naib-Sarpanch or any other Member is or has become disqualified....." The aforesaid emphasis on "is or has become" clearly spells out the power of the Collector to decide the question whether a Member is disqualified or has become disqualified. The verb "is" refers to "pre-existing disqualification or disqualifications" incurred or attached to a member prior to election, and the words "has become" refers to "disqualification incurred after assumption of the office". Same is the power of the Election Tribunal under Section 39 of the Act. The Election Tribunal has to see as to whether on the date of the election the candidate was not qualified or was disqualified to be elected under the provisions of the Act or the Rules made thereunder. The Election Tribunal under Section 39 therefore can also go into the question whether a Sarpanch, Naib-Sarpanch or Ward Member is disqualified or has become disqualified. It is no more res integra that a proceeding under Section 26 and a proceeding under Section 39 can run simultaneously. [see Raghunath Sahoo Vs. Collector and District Magistrate and Others, (2008) 1 OLR 230]. Taking into consideration the overlapping of powers between the Collector and the Election Tribunal, the legislature in the proviso to Section 39(1) has provided that, in relation to matters of disqualifications the Election Tribunal shall have due regard to the decision, if any made under Section 26, before making a declaration under Section 39 of the Act.

18. After the Full Bench decision in the case of Debaki Jani vrs. The Collector & another, A.I.R. 2014 Orissa 138, any person now can move the Collector under Section 26(2) of the Act for a suo motu proceeding to be initiated by him (Collector). The only difference between the two proceedings is that the

proceeding before the Collector is a quasi judicial proceeding and Sub-section (2) of Section 26 provides that provision of natural justice regarding opportunity of being heard to the affected parties is to be complied with. So far as the Election Tribunal is concerned, though the Election Tribunal does not act as a Civil Court, it proceeds in the matter in the trapping of a Civil Court and provision of the Civil Procedure Code, as nearly as may be applicable, applies to the proceeding. The proceeding before the Election Tribunal is judicial in nature. So far as outcome of the proceeding is concerned, the Election Tribunal can declare an election void and he can further declare any contesting candidate, who has polled second highest votes, to be elected. Such declaration cannot however be made by the Collector in a proceeding under Section 26 of the Act. Section 26 is not concerned either with declaration of an election as void or with any consequential declaration as to who should have been elected. It merely enables the persons specified in sub-section (1) of Section 26 and the Collector in a suo motu proceeding on being moved by any person to seek a decision of the Collector on the question of disqualification of a Member, Naib Sarpanch or Sarpanch.

19. In the present case, it is an admitted fact that the petitioner was elected uncontested as a Ward Member. It is further admitted that she had filed nomination paper for the post of Sarpanch. Being an elected Ward Member, though uncontested, her nomination for the post of Sarpanch was accepted and she was allowed to contest the election. She however got elected and assumed the office. The disqualification specified in Section 11(a)(i) has a bearing on Section 10 read with Section 4 of the Act. There being provisions for direct election of the Sarpanch and of the Ward Member, a Ward Member has been debarred from contesting for the post of Sarpanch. The disqualification, as specified in Section 11(a)(i) under law is attached to the petitioner from the very outset, and the Collector, in exercise of his power under Section 26(2), has rightly decided the issue in view of Clause (s) in Section 25(1) of the Act.

20. In view of the above discussions, I do not find any merit in the writ petition, and the same is accordingly dismissed.

1Substituted vide Orissa Act No. 4 of 1993.

2Inserted vide Orissa Act No. 9 of 1991.

3Substituted vide Orissa Gazette Ext. No. 426/18.4.1934-Notfn. No. 6139-Legis./18.4.1994.

4Inserted ibid. 5Substituted vide O.G.E. No. 993 Notfn. No. 7703-Legis. Dt. 28.5.2001.