

(1993) 12 OHC CK 0019

In the Orissa High Court

Case No : Original Jurisdiction Case No. 8898 of 1993

Gopal Krishna Bhanja

APPELLANT

Vs

Sahadev Bisoi and Another

RESPONDENT

Date of Decision : 17-12-1993

Acts Referred:

Orissa Panchayat Samiti (Conduct of Enquiry by the District Judge into the allegation or doubt about disqualification of members) Rules, 1973 — Rule 13
Orissa Panchayat Samiti Act, 1959 — Section 20A(3), 44J, 44K, 44L, 44M

Citation : (1994) 1 OLR 386

Hon'ble Judges : R.K. Patra, J;A. Pasayat, J

Bench : Division Bench

Advocate : M.R. Mohanty 2, L. Mohapatra, B.C. Mohanty and B.K. Nayak, for the Appellant; G. Rath, N.D. Das, L. Samantray, D.N. Udgata, A.K. Choudhury, A.K. Nayak for opp. party No. 1 and Additional Government Advocate for opp. party No. 2, for the Respondent

Final Decision : Allowed

Judgement

A. Pasayat, J.—A short, but interesting point relating to scope and ambit of Section 45-B of Orissa Panchayat Samiti Act, 1959 (in short, the "Act") is the pivotal issue in this case, incidentally some other provisions of the said Act need reference. Since the fate of the application primarily depends upon interpretation of these provisions of the Act, a brief reference to the factual aspect is necessary.

2. Petitioner Gopal Krishna Bhanja and opp. party No. 1 Sahadev Bisoi were the contestants for Chairmanship of Tentulikhunti Panchayat Samiti. The said Panchayat Samiti consists of fourteen Gram Panchayats. From each Gram Panchayat, a member was elected. Sahadev and Gopal Krishna were elected from Amalabhotta and Barangi Podar Gram Panchayats respectively in the election held in the month of May, 1992. Subsequently, as per programme fixed by the Election Officer for the office of Chairman, Tentulikhunti Panchayat Samiti, election was held on 29-6-1992. Sahadev and Gopal Krishna were the only contestants. Each of them secured seven votes, and in view of the situation,

result was declared by a toss and Gopal Krishna was elected. Subsequently, a petition purported to be one u/s 45-3 of the Act was filed by Sahadev before the learned District Judge, Koraput inter alia pleading that Gopal Krishna was not eligible and was disqualified to contest the election as he had a subsisting contract with the Samiti. The petition was filed on 13-9-1993 before the District Judge-cum-Election Commissioner, Jaypore, and was registered as MJC No. 131 of 1992. Subsequently, a petition purported to be u/s 44-C of the Act was filed by Sahadev praying for withdrawal of the petition. The prayer was rejected and the matter was taken up for adjudication by the learned District Judge. By the impugned order dated 6-11-1993, she held that Gopal Krishna had a subsisting contract with the Samiti which rendered him disqualified to stand for election. Additionally Sahadev was declared to be the Chairman, which was indicated to be consequential. In the present writ application, challenge is to the consequential direction given by learned District Judge, on the ground that such a direction could not have been given while exercising jurisdiction u/s 45-B of The Act.

3. Stand of Sahadev in the writ application is that there being two candidates, and disqualification of one of them having been adjudicated as a natural corollary consequential direction for declaration of the other could be given, particularly when he had secured equal number of votes as that of the successful candidates.

4. Before we cogitate and analyse Sahadev's bone of contention in some detail, it will be convenient at this stage to pore over some of the provisions of the Act. Section 16 deals with constitution of the Panchayat Samiti. Sub-sections 1 (a) thereof deals with election of Chairman and Vice Chairman of Samiti, under the provisions of Sub-section (3) Chapter- VI-A of the Act relates to election disputes. Section 44-A deals with election petition and provides that election of a person as a member of a Samiti shall not be called in question except by an election petition presented in accordance with provisions of Chapter VI-A. Section 44-C deals with the manner of presentation of petition, while Section 41-3 relates to parties to the petition. Sec. 44-D and 44-E deal with contests of petition and relief that may be claimed by the petitioner. The petition u/s 44-B has to be presented before the Election Commissioner. Sub-section (2) of the said provision provides that the Subordinate Judge having jurisdiction over the place at which the office of the Samiti is situated is the Election Commissioner. In terms of Section 44-B, a petitioner may in addition to claiming a declaration that the election of all or any of the returned candidate is void, claim a further declaration that he himself or any other candidate has been duly elected. When in an election petition a declaration that any candidate other than the returned candidate has been duly elected is claimed, the returned candidate or any other candidate may give evidence to prove that the election of such candidate would have been void if he had been the returned candidate, and a petition had been presented calling in question his election. This is known as "Recrimination when seat claimed" as the heading of Section 44-1 shows. Section 44-L deals with grounds for which Election Commissioner can declare election of a returned candidate void. Section 44-L (c) is relevant for our purpose. The same reads as

follows ;

"44-L. (1) The Election Commissioner shall declare the election of a returned candidate void, if he is of the opinion-

xx xx xx." (c) that such person was disqualified for election under the provisions of this Act:

xx xx xx."

Disqualifications are enumerated in Section 45, appearing in Chapter VII. So far as the present case is concerned, relevant clause reads as follows ;

"45.(1) A person shall not be eligible to stand for election under Sub-sections (1) and (2) of Section 16 if he-

xx xx xx

(c) is interested in a subsisting contract made with or any work being done for the Samiti (or any Government) except as a share-holder other than a Director in a Company or except as may be prescribed ;

xx xx xx."

Rule 79 of the Orissa Panchayat Samiti (Conduct of Election) Rules, 1970 (in short "Election Rules") carves out conditions where Clause (c) of Sub-section (1) of Section 45 have no application. Section 45-B empowers the District Judge to decide question of disqualification. The said provision reads as follow :

"45-B (1) Whenever it is alleged that any member of a Samiti is or has become disqualified, or whenever any such member is himself in doubt whether or not he is or has become disqualified such member or any other member may, and the Chairman at the request of the Samities shall apply to the District Judge, having jurisdiction over the place where the office of the Samiti is situated, for a decision on the allegation or doubt.

(2) The District Judge (after holding an enquiry in the prescribed manner) shall determine whether or not such member is or has become disqualified and his decision shall be final.

(3) Pending such decision the member shall be entitled to act as if he was not disqualified."

A candidate in an election dispute can raise a point regarding disqualification of a person and the Election Commissioner, if he is of the opinion that such person was disqualified for election under the provision of the Act, can declare election of a returned candidate to be void. The declaration about a candidate other than the returned candidate to have been elected can be given in an election petition as provided for in Section 44-M, where the person who has lodged a petition in addition to calling in question the election of the returned candidate, claims a declaration that he himself or any other candidate received a majority of the

valid votes. Such a declaration can be made by the Election Commissioner on two grounds where it is of the opinion (i) that the petitioner or such other candidate received a majority of valid votes, or (ii) that but for the votes obtained by the returned candidate by a corrupt practice, petitioner or such other candidate would have obtained a majority of valid votes. In the case at hand, "Corrupt practice" as defined in Sec 44 N, was neither pleaded nor established. Only ground of challenge before the District Judge related to disqualification on the ground of interestedness in a subsisting contract. Provisions of Section 44-M are almost in part materia with provisions, of Section 101 of Representation of Peoples Act. The power given to the District Judge u/s 45-B is delineated to the adjudication of question relating to disqualification of a member. Such disqualification may be already in existence, or may have accrued subsequent to the election. The extent of power to be exercised by the District Judge u/s 45-B is indicated in Sub-section (2) thereof. He has the power to determine, after holding enquiry in the prescribed manner, whether a member is or has become disqualified. Finality is given to his decision under the statute. The manner of enquiry is provided in the Orissa Panchayat Samiti (Conduct of Enquiry by the District Judge into the Allegation or Doubts about Disqualifications of Members) Rules, 1973 (in short, the "Disqualification Rules"). Rule 13 deals with the nature of order to be passed. Neither in Sec.45-B of the Act nor in Rule 13 there is anything which authorises the District Judge to give a declaration that any person other than the elected candidate to have been duly elected. It is beyond the scope of enquiry and/or jurisdiction under the said provisions. Nature of powers exercised by Election Commissioner functioning u/s 44-J, 44-K, 44-L and 44-M and District Judge u/s 4b-B. Decisions tendered by Election Commissioner relate to circumstances up to election, while District Judge can also take note of circumstances occurring after election. The consequence of a declaration by the District Judge that a member is or has become disqualified is indicated in Rule 13 (2). Such person ceases to be a member of the Samiti from the date of such order. If the legislature intended that the District Judge can make a declaration about any other person to have been duly elected, the same could have been specifically provided for as done in Sec 41-M. The omission cannot be unintentional considering limited nature of function indicated in Section 45-B. Learned District Judge could not have given direction declaring Sahadev to be the Chairman of Tentulikhunti Panchayat Samiti. That part of direction as contained in her order dated 6-11-1993 vide Annexure-4 is quashed, We have not delved into the question whether there was any disqualification, as that aspect was not pressed before us.

5. Modality to be observed when there is a casual vacancy as indicated in Section 47. In terms of Section 20-A (3) in view of vacancy of the office of Chairman, the Vice-Chairman of the Samiti shall exercise power as prescribed.

The writ application is allowed, but in the circumstances of the case, there shall be no order as to costs.

R.K. Patra, J.

I agree.