
(1965) 03 OHC CK 0007
In the Orissa High Court
Case No : O.J.C. No. 39 of 1964

Haribandhu Satpathy

APPELLANT

Vs

Chandrasekhar Surendra Singh and Others

RESPONDENT

Date of Decision : 12-03-1965

Acts Referred:

Constitution of India, 1950 — Article 226
Orissa Grama Panchayat Act, 1948 — Section 10, 44(1), 44(2), 97(2)
Orissa Grama Panchayat Rules, 1949 — Rule 24, 32, 37, 38(A)

Citation : AIR 1966 Ori 12 : (1965) 31 CLT 708

Hon'ble Judges : S. Barman, J;G.K. Misra, J

Bench : Division Bench

Advocate : S.C. Mohanty, for the Appellant; A.G. and B.K. Behura, for the Respondent

Final Decision : Dismissed

Judgement

Barman, J.—The petitioner Haribandhu Satpathy was a Sarpanch of Mancheswar Gram Panehavet. Athgarh Subdivision, in the district of Cuttack until he was removed on a no-confidence motion passed against him. The petitioner challenges the election of his rival opposite party No. 1 Chandrasekhar Surendra Singh who, in the casual vacancy thus occurred, was elected at a by-election held by the Election Officer on November 29, 1963 after notice dated November 18, 1963 by the Election Officer who fixed the date of the by-election.

2. The voting position at the by-election was this: Total number of voters was 24 including the 2 candidates who were left out. So out of the remaining 22 voters. 8 voted for the petitioner and 14 for rival candidate who was declared elected,

3. The petitioner Haribandhu Satpathy had filed a petition challenging the election of his rival under Rule 24 of the Orissa Gram Panchayat Rules. 1949 before the Sub-Divisional Officer. Athgarh who declared that the election of Chandrasekhar Surendra Singh is valid and accordingly dismissed the petitioner's petition. It is against this order of the Sub Divisional Officer that this

writ petition has been filed in this Court.

4. The points urged on behalf of the petitioner herein are these; The Election Officer has no power under Rule 32 of the Orissa Gram Panchayet Rules, 1949 to fix a date of by-election of Sarpanch. The District Magistrate alone can fix a date for holding a by-election, According to the petitioner R. 32 is mandatory It was also contended that the nomination of the rival candidate Chandrasekhar Surendra Singh as Sarpanch was illegal as he was a defaulter in the matter of payment of Panchayat taxes imposed on him u/s 44(j) of the Orissa Gram Panchayat Act. Lastly it was submitted that the Sub Divisional Officer had disposed of the case without giving the petitioner an opportunity to say what he had to say in respect of his contentions and thereby acted against natural justice.

5. On the question who is to fix a date for holding a by-election to fill up the vacancy occurring on account of the removal of a Sarpanch (as in the present case) Rule 32 under caption "Casual Vacancies" provides

"32. In the case of a casual vacancy occurring on account of the removal, resignation or death of a members of a Gram Panchayet. Panch or President of an Adalati Panchayati. Sarpanch or Naib Sarpanch the Sarpanch or the Naib Sarpanch as the case may be shall forthwith report the fact to the District Magistrate who shall fix a date as soon as conveniently. may be for holding a by election to fill up the vacancy. The foregoing rules shall apply to such by election but it shall not be necessary to republish the register of population "

6. The petitioner's point is that Rule 32 is mandatory in that the District Magistrate alone can fix a date for holding a by election in the case of a casual vacancy occurring on account of casualties mentioned in the Rule. The petitioner's point is that the Rule is mandatory in that the fixation of a date for holding a by-election by a competent authority, namely the District Magistrate specifically mentioned in the Rule is a pre requisite for holding the by-election to fill up the vacancy; unless that has been done the Election Officer has no jurisdiction to proceed with the by-election. u/s 97 (2) of the Act the District Magistrate may, by an order in writing, delegate this power or function of fixing a date for holding a by-election, to any officer subordinate to him.

7. The question is. Is Rule 32 mandatory or merely directory? This is a point of interpretation of the Rule having regard to the real intention of the legislature. In this context certain undisputed principles have been laid down both by the Privy Council as also the Supreme Court which are summarised thus. It is well settled general rule that "an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially". It is sufficient if the plain object of the directory provision is carried out. An enactment in form mandatory might in substance be directory. The use of the word "shall" does not conclude the matter. However, these and other rules are only aids for ascertaining the true intention of the legislature which is the determining factor, and that must ultimately depend on the context. The practical

bearing of the distinction between a provision which is mandatory and one which is directory is that while the former must be strictly observed, in the case of the latter it is sufficient that it is substantially complied with. The tendency of the Courts towards technicality is to be deprecated; it is the substance that counts and must take precedence over mere form. Some rules are vital and go to the root of the matter; they cannot be broken: others are only directory and a breach of them can be overlooked provided there is substantial compliance with the rules read as a whole and provided no prejudice ensues; and when the legislature does not itself state which is which judges must determine the matter and exercising a nice discrimination, sort out one class from the other along broad based, common-sense lines.

8. Rule 32 enjoins the performance of a public duty by the District Magistrate to fix a date for holding a by-election to fill up the casual vacancy. In such cases, where the prescriptions of a statute relate to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, yet not promote the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. It does not affect the validity of the act done in disregard of them. There is ample authority in support of this view as discussed by Maxwell on Interpretation of Statutes (11th Edition 369) with reference to the provisions of particular English Statutes mentioned therein.

9. The regulations for the conduct of elections under the English Ballot Act, 1872 (c. 33) were held to be so far only directory that an election was not invalidated by the non-observance of them unless the non-observance was of a character contrary to the principle of the Act, or might have affected the result of the election. *Woodward v. Sarsons* (1875) 10 CP 733; *Phillips v Goff* (1886) 17 QBD 805.

10. In our opinion, to hold that Rule 32 which required the District Magistrate to fix a date for holding a by election, made the election proceeding held on a date not fixed by the District Magistrate invalid, would in effect, render the election of the person so elected invalid for no fault of his, a conclusion too unreasonable for acceptance is our view, although the election officer fixed the date for holding the by-election, the election of the person at the by-election so held will not be invalid only because the District Magistrate did not fix the date for holding the by-election.

11. The power of fixing a date under Rule 32 for holding the by-election can be delegated by the District Magistrate to the Election Officer who is subordinate to him u/s 97(2). This shows that the rule is not mandatory but directory. In the view that we have taken that Rule 32 is only directory, the question of the effect of the alleged subsequent ratification by the District Magistrate of the act of the Election Officer fixing the date for holding the by-election, on which the learned

Advocate General relies, does not arise.

12. The next question is Was the rival elected candidate opposite party no. 1 Chandrasekhar Surendra Singh eligible to stand for election? The petitioners case is that the rival candidate was a defaulter in the matter of payment of Panchayel Taxes for a period of more than two years. Section 44(2) (j) of the Orissa Grama Panchayat Act under which taxes may be imposed is this:

"44 ("2) With the previous sanction of the Provincial Government and subject to such maximum and minimum rates as may be prescribed a Gram Panchayat may impose the following tax toll fee or rate-

xx xx xx (j) a lax payable by owners of vehicles suitable for use on roads and mentioned in Schedule IV subject to the maximum specified in the said schedule where such vehicles suitable for use on roads and are kept in the Grama Panchayat area."''

The ineligibility for election for non-payment of such taxes is laid down in Section 10 of the Act which so far as material is this:

"10(9) A person shall not be eligible to stand for election as or continue to be a member of the Gram Panchayat or a Panch of an Adalati Panchayat constituted under this Act If

x x x x (e) he has been in arrears of any tax, fee or rate due by him to the Grama Sasan for a continuous period of two years; or

xx xx xx Provided further that the disqualification under clause (e) shall cease upon payment of the arrears or on remission thereof in accordance with the provisions of the Act and the rules made thereunder:

Provided also that any one or more of the aforesaid disqualifications shall be given effect to in the prescribed manner and in case of any dispute the matter shall be referred to the State Government whose decision shall be final and shall not be questioned in any court of law."

13. It is thus clear that the ineligibility for election is subject to certain conditions, inter alia proviso 3 quoted above. It is not that even if a person is in arrears of any tax there will be automatic disqualification. The disqualification has to be given effect to in the manner prescribed by the rules made by the State Government under the Act. The relevant rules of the Orissa Grama Panchayat Rules by which such disqualification of a person is to be given effect are Rules 37 and 38A, namely, so far as material-

"37. The District Magistrate may by notification remove a Panch or a President of an Adalati Panchayat.

(a) if he ceases to be a member of the Grama Sasan or is disqualified under Subsection (9) of Section 10 of the Act. Or

X X X X x" "38A. The District Magistrate may by notification remove a member of

the Grama Panchayat.

(a) if he ceases to be a member of the Grama Sasan or is disqualified under Sub-section (9) of S 10 of the Act. Or

x x x x x"

14. In the present case the alleged ineligibility of the rival candidate opposite party No. 1 who was elected at the by-election was not notified by the District Magistrate in the manner prescribed by the rules under the Act. Moreover, there is nothing on record to show that the question of the alleged ineligibility of the candidate was ever even raised. Therefore apart from the position that no objection to the candidature of the rival candidate opposite party No. 1 on account of alleged arrear of Panchayat taxes was raised before the Presiding Officer at the time of scrutiny of nomination papers the question of alleged ineligibility of the candidate to stand for election did not arise until it was decided and notified in the manner prescribed by the rules under the Act.

15. Lastly, did the Sub Divisional Officer act against natural justice? The powers of the Sub Divisional Officer are laid down in Rule 24 which says

"Save as otherwise provided, all disputes arising under the preceding rules (as also Rule 31-A and Rules 31-C to 31-J) shall be decided by the Sub Divisional Magistrate whose decision shall be final and cannot be called in question in any proceeding whatsoever."

There can be no doubt that with exercising powers under Rule 24, the Sub Divisional Officer acts as a Judicial Officer It is too elementary that no judicial order can be passed so as to affect adversely the right of a party unless he is given a reasonable opportunity of being heard. The petitioner's point is that he was not heard before the Sub Divisional Officer passed the order upholding the election of the rival candidate, that the very fact that the Sub Divisional Officer subsequently called for report from the Election Officer on January 14, 1964 shows that the petitioner was not heard. The petitioner submits that the report of the Election Officer was used against him without giving him an opportunity of being heard

16. Assuming that the petitioner was not heard the question is: Was the petitioner thereby prejudiced? Our considered view is: No. In such a case, the question for consideration is whether at this stage it will be proper to interfere in exercise of this Court's extraordinary jurisdiction under Article 226 of the Constitution and direct the Sub-Divisional Magistrate to hear the petitioner before passing any order. If by such direction there is a reasonable probability that the decision of the Sub Divisional Officer may be changed, we would not have hesitated to pass such an order. We have carefully examined the points raised by the petitioner We are satisfied that even if the petitioner had been given an opportunity of being heard by the S. D. O. the petitioner could not possibly have improved his case in any way. This our view is supported by a

Division Bench decision of this Court in Upendranath v. B. N. Sadangi. 31 Cut LT 128.

17. In these circumstances we are not inclined to interfere with the order of the Sub Divisional Officer The writ petition therefore fails and is dismissed. There will be no order for costs.

Misra, J.

18. I agree.