
(1998) 07 OHC CK 0029
In the Orissa High Court
Case No : Misc. Appeal No. 781 of 1997

Malaya Kumar Mohanta	Vs	APPELLANT
Collector, Mayurbhanj and Others		RESPONDENT

Date of Decision : 09-07-1998

Acts Referred:

Orissa Zilla Parishad Act, 1991 — Section 33(1)

Citation : AIR 1999 Ori 5

Hon'ble Judges : P.K. Misra, J

Bench : Single Bench

Advocate : J. Katikia and B.K. Mishra, for the Appellant; B. Rath, B. Senapati, K.R. Mohapatra, J. Rath, S.K. Jathy, S.B. Mohanty, P.S. Sammantara, K.K. Panda, S.K. Patjoshi, P.K. Panda and M. Sahani, for the Respondent

Final Decision : Allowed

Judgement

P.K. Misra, J.—This is an appeal u/s 32(2)(iv) of the Orissa Zilla Parishad Act, 1991 (Orissa Act 17 of 1991). The appellant and respondents 4 to 9 had contested election to Zilla Parishad from Muruda-II (Zilla Parishad Constituency No. 40). In the said election, respondent No. 4 was declared elected having secured the highest votes. The present appellant had secured, the next highest votes. The present appellant filed Election M.J.C. No. 13 of 1997 before the District Judge, Mayurbhanj, Baripada, challenging the election of respondent No. 4, inter alia, on the ground that the present respondent No. 4 was not eligible to contest the election as he had more than two children and his fourth child was born on 4-6-1995.

Respondent No. 4 who was opposite party No. 4 before the Court below filed a written statement countering the allegations made in the election petition. It was stated in the written statement that all the issues of opposite party No. 4 were born within the cut-off date as prescribed in Section 33(1)(w) of the Orissa Zilla Parishad Act (hereinafter referred to as the "Act").

The trial Court rejected the petition holding that the materials on record did not establish beyond doubt about the birth of the fourth child after the due date and the evidence on that behalf was not conclusive. Hence the present appeal.

2. Before entering upon the disputed questions of fact, it would be appropriate to notice the relevant provision of law which was incorporated by way of amendment by the Orissa Zilla Parishad (Amendment) Act, 1993 (Orissa Act 17 of 1993). By Section 12 of the Amending Act, Section 33 of the principal Act was amended. After amendment, the relevant provision contained in Section 33(1) (w) reads as follows :--

"33. Disqualification for becoming a member and continuing as member-

(1) A person shall not be eligible to stand for election under Clause (a) of Sub-Section (1) of Section 6, if he-

(w) has more than two children;

Provided further that the disqualification under Clause (w) shall not apply to a person who has more than two children on the date of commencement of the Orissa Zilla Parishad (Amendment) Act, 1993, 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."

On a bare perusal of the aforesaid provision, it becomes clear that person having more than two children shall not be eligible to contest the election if such additional child is born beyond a period of one year from the date of the commencement of the Amending Act. In other words, even if a person has got more than two children, he can contest the election if all the children were born before expiry of one year from the date of commencement of the Amending Act. Where, however, the person has already two or more children and the third or the subsequent child is born after the expiry of one year from the date of commencement of the Amending Act, such person would be ineligible to contest the election. The embargo is on the person who begets the additional child after the stipulated date. Keeping in view the aforesaid provision of law, the core question which falls for consideration is whether respondent No. 4 had more than two children and whether such additional child was born on or after 1-11-1994, as admittedly, the Amending Act came into force on 1-11-1993.

3. The appellant had categorically stated in the election petition that the fourth child, a daughter, was born in the year 1995. Respondent No. 4 while not denying categorically about the existence of four children, had taken the plea that all the children were born before the stipulated date and the disqualification u/s 33(1)(w) of the Act was not applicable.

4. In support of his case, the appellant, apart from examining himself and some other witnesses had examined the Anganbadi worker of the village and had also proved the Death and Birth Register. P.W. 1, another candidate, who had lost the election, had stated that the name of wife of opposite party No. 4 was Hemalata

Mohanta. Such statement has not been challenged in cross-examination in any manner. The election petitioner (present appellant) examined as P.W. 4 had stated that the four children of opposite party No.4 were born in the years 1982, 1987, 1990 and 1995. In cross-examination on this aspect, the only suggestion was that Haris Mohanta had got only two children which was denied by the said witness. From the pleadings of the parties, it is apparent that the specific case of the election-petitioner to the effect that opposite party No. 4 had four children had not been specifically denied. The tenor of the denial in the written statement was relating to the years of birth of these children. Apart from the aforesaid evidence, the evidence of P.W. 3, the Anganbadi worker, read with the Death and Birth Register (Ext. 1) clearly tilts the balance in favour of the election-petitioner. P.W. 3 had stated that she knew Hemlata, wife of Haris Mohanta. She has further stated that Haris Mohanta has got four children. The last child was born on 4-6-1995. Ext. 1/1 is the relevant entry in the Death and Birth Register which was marked as Ext. 1. She further stated :--

"..... .Hemalata's husband is now associated with Zilla Parishad."

A conjoint reading of the evidence of P.W. 3 leaves no room for doubt that P.W. 3 was referring to opposite party No. 4. It is thus evident from the evidence of P.W. 3 read with Death and Birth Register that opposite party No. 4 had four children and the fourth child was born on 4-6-1995. Though in cross-examination, the evidence had been challenged and the genuineness of birth register had been challenged, the birth register cannot be discarded as a manufactured one. It is, of course, true that since the appellant was challenging the election of opposite party No. 4, the initial burden was on the appellant to show that opposite party No. 4 was ineligible. This burden has been amply discharged by the evidence already noticed. As against this definite stand and evidence on the side of the appellant, no evidence has been adduced on behalf of respondent No. 4 rebutting the evidence adduced on behalf of the present appellant. Respondent No. 4 had taken a plea that his children had been born before the cut-off date. The question of date of birth of a child is within the special knowledge of the parents concerned. In the present case, respondent No. 4 has not chosen to examine any witness and he has also not examined himself. Keeping in view the fact that some evidence had been adduced on behalf of the appellant, the burden definitely shifted to respondent No. 4 to disprove the evidence on the side of the appellant, instead of doing so, respondent No. 4 has even withheld himself from the dock which calls for raising an adverse inference against the case of respondent No. 4. Thus, there is no escape from the conclusion that the fourth child of respondent No. 4 was born after the stipulated date.

5. In course of hearing of this appeal, it was submitted by the counsel for respondent No. 4 that the matter may be remitted to the District Judge for fresh disposal so that respondent No. 4 can examine himself and adduce other evidence. However, on going through the order-sheet of the trial Court, it is found that after the close of evidence on the side of the election-petitioner,

opposite party No. 4 declined to adduce any evidence. Since consciously opposite party No. 4 had declined to adduce any evidence, there is hardly any scope for giving him further opportunity at this stage.

6. Having regard to all these aspects, differing from the finding of the trial Court, I conclude that the fourth child, that is to say, a daughter, was born to opposite party No. 4 on 4-6-1995. As such, opposite party No. 4 was ineligible to contest the election in view of the provisions contained in Section 33(1)(w) of the Act.

7. Mr. J. Katikia, learned counsel for the appellant, then submitted that since respondent No. 4 was ineligible to contest the election and the appellant had secured the second highest votes, he should be declared to have been elected in the election. Such a submission cannot be accepted. In the present case, respondent No. 4 was ineligible to contest the election. If he would not have contested the election, the votes cast in his favour would have been distributed among the other candidates including present appellant. In such a case, it would not be possible to say definitely that the present appellant would have secured the highest number of votes. As such, the present appellant cannot be declared to have been elected. Since respondent No. 4 was ineligible, his election is set aside and it is directed that a fresh election be held in accordance with the provisions contained in the Act. Accordingly, the Misc. Appeal is allowed. There will be no order as to costs.