

(2006) 08 OHC CK 0006

In the Orissa High Court

Case No : Writ Petition (Civil) No. 4135 of 2005

Prasanta Kumar Sahoo

APPELLANT

Vs

Chiranjaya Sahoo and Others

RESPONDENT

Date of Decision : 25-08-2006

Acts Referred:

Evidence Act, 1872 — Section 106, 35

Orissa Municipal Corporation Act, 2003 — Section 70(3), 88, 89

Citation : (2006) 08 OHC CK 0006

Hon'ble Judges : I. Mahanty, J;A.K. Ganguly, J

Bench : Division Bench

Advocate : Pitambar Acharya, S.K. Pati, P.K. Ray and B. Dash, for the Appellant; Bidyadhar Mishra, G. Agrawal and K. Mishra, for the Respondent

Judgement

I. Mahanty, J.—In this writ application, the Petitioner-Prasanta Kumar Sahoo seeks to challenge an order dated 16.3.2005 passed in Election Misc. Case No. 1 of 2003 by the learned District Judge, Cuttack, setting aside the election of the Petitioner to the post of Corporator of Ward No. 35 of the Cuttack Municipal Corporation.

2. The Opp. Party No. 1 - Chiranjaya Sahoo, had filed an Election petition under Sections 88 and 89 of the Orissa Municipal Corporation Act, 2003 (hereinafter referred to as "the Act") seeking to declare the election of the present Petitioner to the post of Corporator of Ward No. 35 (Chauliaganj) as illegal and void on the allegation that the Petitioner herein was disqualified in terms of Section 70(3)(m) of the Act, which is quoted herein below:

(m) has more than two children;

Provided that the disqualification under this clause shall not apply to a person who had more than two children on the date of commencement of the Orissa Municipal (Amendment) Act, 1994, (Orissa Act 11 of 1994) or, as the case may be, within a period of one year of such commencement unless he begot an

additional child after the said period of one year.

It would be relevant to point out here that the Orissa Act 11 of 1994 amending the Orissa Municipal Act, 1994 came into force with effect from 31.5.1994 and therefore, the aforesaid clause and the bar contained therein came into force on 31.5.1995 i.e. within a period of one year from the date of such commencement.

3. In the impugned proceeding, it was alleged by the present Opp. Party No. 1 that the present Petitioner had more than two children and was therefore disqualified under Section 70(3)(m) from contesting the election to the corporation. According to the present Opp. Party No. 1, the name of the first son of the present Petitioner is Nirmal Kumar Sahoo whose date of birth is 12.5.1990, the second son of the Petitioner is Bishal Kumar Sahoo whose date of birth is 23.4.1993 and the third child namely, Ananta Kumar Sahoo was born on 6.5.1997. Accordingly, it was alleged that since the Petitioner's third child was born on 6.5.1997 i.e. after the cut off date 31.5.1995. Accordingly the Petitioner was disqualified in terms of Section 70(3)(m) of the Act.

4. The Petitioner contested the case before the learned District Judge by filing written objection admitting the fact that he has three sons but took a stand that his third son, namely, Ananta Kumar Sahoo was born on 6.5.1995 and not on 6.5.1997 as alleged and since the third son had been born prior to the cut off date, he was not disqualified from contesting the election.

5. Basing on the aforesaid rival contentions, the learned District Judge framed various issues for determination of the case and the most important issue being issue No. 2, the same is quoted herein below:

Whether the opposite party No. 1 is disqualified to contest the election as Corporator by begetting the third child after the statutory period?

After discussing various documentary as well as oral evidence produced by the rival parties, the learned District Judge answered the said issue in favour of the Opp. Party No. 1 and against the Petitioner and reached a finding that the third child of the Petitioner was born on 6.5.1997 and hence, the present Petitioner was declared disqualified in terms of Section 70(3)(m) of the Act and his election was declared illegal and void.

6. In the present writ application, the Petitioner (the original returned candidate) challenges the order of the learned District Judge on the following main ground of challenge amongst other grounds:

The finding of the learned District Judge is solely based upon a tampered and manipulated entry in a "School Admission Register" of a purely private school. The finding of the learned District Judge is not only perverse and untenable in the eye of law, but also the same is against the weightage of evidence and the settled position of law as has been held by several judicial pronouncements of the Apex Court as well as this Court.

7. In the impugned judgment, certain important aspects have been dealt with by the learned District Judge which relate to the "School Admission Register" and those are noted herein below:

(1) Ext-1 is the School Admission Register of Utkal Shishu Sikshya Mandir, Chauliaganj, Cuttack from the year 1995.

(2) This Register has been exhibited by the Headmaster of the School (P.W. 1).

(3) No objection was raised on behalf of O.P. No. 1 (Petitioner in this writ application) when the document was exhibited by P.W. 1.

(4) This Register reveals that on 5.4.1995 one Nirmal Kumar Sahoo had taken admission who is the first issue of O.P. No. 1 (Petitioner in this writ application) and his date of birth was shown as 12.5.1990 (Ext-1/a).

(5) Similarly on 3.4.1997 one Bisal Kumar Sahoo i.e. the second son of the present Petitioner, was admitted in the said school whose date of birth was 23.4.1993 (Ext-1/b).

(6) The disputed entry is Ext-1/c, which relates to Serial No. 68/416 under which the date of admission of one Ananta Kumar Sahoo has been recorded as 12.7.2001 and his date of birth is 6.5.1997 whereas the case of the present Petitioner is that the date of birth of Ananta Kumar Sahoo is 6.5.1995.

The learned District Judge having noted the aforesaid facts has come to the conclusion that Ext-1/c which contains the entry in the School Admission Register regarding Ananta Kumar Sahoo (third child) had been over-written and in fact, held that the original year of birth i.e. 1997 had been over-written to make it appear as if the year of birth is 1995 without any explanation and also without necessary verification to the said alteration.

8. Mr. P. Acharya, learned Counsel for the Petitioner contended that the opposite parties' assertion, that the Petitioner's third child was born on 6.5.1997 has not been proved since the school admission register has been tampered and the said document was not a public document as the school in question is a private school. He further submitted that in terms of Section 35 of the Indian Evidence Act, 1872, the Election Petitioner has miserably failed to establish the date of birth of the third child of the Petitioner as 6.5.1997 and instead, has attempted to shift the burden of proving that the third child was born on 6.5.1997 to the Petitioner. It is further contended on behalf of the Petitioner that opposite party No. 1 has not raised any objection to the nomination of the Petitioner at the time of filing of the same nor at the time of scrutiny of nomination papers and that filing of election dispute was purely on account of opposite party No. 1's defeat in the election held to the Cuttack Municipal Corporation. Therefore, Mr. Acharya while vehemently objecting to the reliance placed on Ext. 1/c (Entry No. 68/416) for the reasons noted hereinabove, has further contended that learned Dist. Judge ought not to have placed reliance on Entry No. 78/426 relating to Petitioner's third child Ananta Kumar Sahoo and ought to have held that the

Petitioner's third child's date of birth was 6.5.95. In support of the aforesaid contentions, learned Counsel for the Petitioner has placed reliance on the case of Brij Mohan Singh Vs. Priya Brat Narain Sinha and Others, and in the case of Sushil Kumar Vs. Rakesh Kumar, apart from the case of Mayadhar Nayak Vs. Sub-Divisional Officer, Jajpur and Others, and certain other judgments. Learned Counsel for the Petitioner while placing reliance on the aforesaid judgments pleaded that the entry relating to the date of birth in school admission register has no evidentiary value to prove the age of a person in absence of the material on which the age was recorded.

Learned Counsel for the Petitioner further submitted that mere marking of a document, as an exhibit does not dispense with proof of the same under the Indian Evidence Act. He has further contended that even if the entire document is held formally proved, that does not amount to a proof of the truth of the contents of the document. In support of this contention, learned Counsel for the Petitioner has placed reliance in the case of Mohammed Yusuf and Another Vs. D. and Another, and in the case of Sait Tarajee Khimchand and Others Vs. Yelamarti Satyam alias Sattayya and Others, While placing a reliance on the aforesaid citations, learned Counsel for the Petitioner submitted that an entry in school register has to be made on the basis of the statement of the father relating to the date of birth and such entry should be of a public document to be made by a public servant in discharge of his statutory duties.

Learned Counsel for the Petitioner further submitted that not only Ext. 1/c, but also Ext.1 should be discarded being of no relevancy. Learned Counsel for the Petitioner drew the attention of the Court to Ext.A, a certificate granted by the headmaster on 15.7.2003 indicating the date of birth of Ananta Kumar Sahoo, the third child of the Petitioner as 6.5.1995 as well as Ext. B-Series, the prescriptions of the treating physician and Ext. C, the certificate of birth granted by the Cuttack Municipal Corporation relating to the third child of the Petitioner-Ananta Kumar Sahoo showing the date of birth of that child as 6.5.1995 and strongly urged to quash the impugned order passed by the learned District Judge.

9. On the other hand, Shri Bidyadhar Mishra, learned Counsel for Opp. Party No. 1 submitted that Opp. Party No. 1, in fact, established his case in the proceeding before the learned District Judge and has placed reliance on Ext-1 (School Admission Register), Ext-1/a, Ext-1/b and Ext-1/c i.e. the relevant entries in the School Admission Register indicating the date of birth of the Petitioner's third child. He further submitted that the School Admission Register is a statutorily maintained document which has got presumptive value of correctness regarding the date of birth and in this" regard, he submitted that Opp. Party No. 1 has duly discharged the burden of proving that was required to be established. The initial burden to prove the allegations made in the Election Petition was duly discharged by the Election-Petitioner and therefore for proving the facts which are within the special knowledge of the present Petitioner, the burden is upon him in terms of Section 106 of the Indian Evidence Act and for this purpose reliance has been

placed on the case of Sushil Kumar Vs. Rakesh Kumar, .

Mr. Mishra, further submitted that the learned District Judge has rightly rejected Ext-C i.e. the birth certificate granted by the Cuttack Municipal Corporation since that certificate was obtained by the present Petitioner stealthily without notice to the election Petitioner and after filing of the election dispute. He submitted that no reliance can be placed on the document which has been obtained after commencement of the lis and ought not to be accepted. For such purpose, Mr. Mishra has placed reliance in the case of H. Subba Rao v. The Life Insurance Corporation of India and Anr. AIR 1976 Kar 231, Sk. Rahimuddin Vs. Ojifa Bibi and Others, and Karimabibi and Others Vs. Ankleshwar Municipality and Others, .

Mr. Mishra, further submitted that no reliance has been placed on Ext-A by the learned District Judge inasmuch as the Petitioner himself in his evidence did not rely nor refer to Ext-A. Shri Mishra submitted that till the last date of nomination, such a document Ext-A was not available and it was issued on 15.7.2003. He further submits that the Headmaster (P.W. 1) who purportedly issued Ext-A also stated in his evidence that he has not indicated any date under his signature in Ext-A and further stated that no authenticated document was produced before him with regard to the date of birth while issuing Ext-A and therefore, the said document has been correctly held to be of no consequence by the learned District Judge. So far as Ext-B is concerned, Mr. Mishra, learned Counsel for Opp. Party No. 1 submitted that those prescriptions are of no evidentiary value since they have not been written on the printing pad of the concerned doctor and apart from that, those prescriptions do not bear the signature of the wife of the Petitioner and do not bear the registration number of the doctor who purportedly signed the same. Therefore, in the light of the submissions advanced by Mr. Mishra, the present writ application merits no consideration whatsoever and the order of the learned District Judge should be affirmed and the writ application may be dismissed in limine.

10. Before concluding his argument, Mr. Mishra submitted that the present writ application is not maintainable inasmuch as it is well settled that the jurisdiction of the High Court to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. He submitted that the nature of the contentions advanced by the learned Counsel for the Petitioner is of the nature that would be advanced before the appellate court, which is impermissible in law. He submitted that such limitation necessarily means that the finding of fact reached by the inferior court or Tribunal as result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ court, but not an error of fact unless it is wholly perverse. He submitted that the finding of the learned District Judge vis-a-vis the date of birth of Ananta Kumar Sahoo is a finding of fact and such a finding of fact cannot be said to be a perverse finding nor a finding based on no evidence. Mr. Mishra submitted that for any finding of fact recorded by the Tribunal, a writ of certiorari can be issued

if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Accordingly, if a finding of fact is based on no evidence that would be regarded as an error of law which can be corrected by a writ of certiorari. He vehemently submitted that the Petitioner has not made out any case on any of the aforesaid grounds.

11. In the light of the aforesaid rival contentions, it is to be ascertained whether in the facts of the present case, opposite party No. 1 had discharged its "initial burden" to prove the allegations made in the election petition. It is important because if such initial burden of proof is discharged by opposite party No. 1, then onus would lie upon the present Petitioner for proving the facts which are within his special knowledge and, therefore, the burden would shift to the Petitioner in terms of Section 106 of the Indian Evidence Act. The aforesaid principle of law has been laid down by the Hon"ble Apex Court in the case of Sushil Kumar Vs. Rakesh Kumar, wherein the Apex Court on the facts of the said case held as follows:

It is also trite that when both parties have adduced evidence, the question of onus of proof becomes academic.

12. In the case at hand as noted earlier, the opposite party No. 1 in order to discharge the "initial burden" of proof has brought on record the Ext. 1, i.e., the school admission register and the same was exhibited by the headmaster of the school to which no objection was raised on behalf of the Petitioner when the document was exhibited. We are of the view that opposite party No. 1 has prima facie discharged its initial burden of proving the allegations made in the election petition.

Further, the present Petitioner in order to try and refute the allegations of the election Petitioner has sought to prove various documentary and oral evidence, but the learned District Judge on a detailed discussion of such evidence, has rejected the same. Ext.A is a certificate issued by the headmaster of Utkal Shishu Sikshya Mandir wherein it has been stated that the date of birth of Anant Kumar Sahoo (third child of the Petitioner) is 6.5.1995 which has been relied upon by the Petitioner. The headmaster who has issued Ext.A on 15.7.2003 was examined in the case as P.W. 1 and in his cross-examination, he has stated that he has issued Ext.A basing on the entry made in Ext. 1/c. The learned District Judge on a careful scrutiny of Ext. 1/c in the school admission register concluded that the date of birth, particularly the year has been over written without his attestation. Further, the present Petitioner's other two children have also studied in the self-same school and their date of birth were found mentioned in the self-same admission register which are not in dispute. The learned District Judge further noted the fact that the third child of the present Petitioner (Anant Kumar Sahoo) took admission in the school along with his cousin Rajesh kumar Sahoo on the same day. Rajesh Kumar Sahoo's date of birth as indicated in the School Admission Register is 6.2.1997 and he was admitted to Class KG-II along with

Anant Kumar Sahoo (third son of the Petitioner). On a comparison of the same, if the assertion of the present Petitioner is accepted then Rajesh Kumar Sahoo would be four years old whereas Anant Kumar Sahoo would be more than six years old and both of them took admission in the self-same class. On the aforesaid analogy, the learned District Judge concluded that the date of birth of Anant kumar Sahoo as recorded in Ext. 1/c had been corrected and the original year of birth, i.e., 1997 had been recorded in respect of Anant Kumar Sahoo and had been over written showing the year as 1995.

It would be appropriate to point out here that the School Admission Register (Ext-1) contains admission details of all the three sons of the Petitioner and all the entries relatable to his sons have been countersigned by him and no evidence has been brought on record by the Petitioner either to the contrary or to prove that any date mentioned in the said entries is erroneous in course of his examination-in-chief nor has disputed his signatures in any of the three entries Exts-1/a, 1/b and 1/c.

The learned District Judge concluded that the headmaster having claimed to have issued Ext. A on the basis of Ext. 1, no challenge to Ext. 1 could, therefore, be entertained and further Ext. A in comparison to Ext. 1/c not being in conformity and having been purportedly issued on 12.7.2001, i.e., after the election, cannot be relied upon and has been obtained for the purpose of this case.

13. In so far as doctor's prescriptions vide Annexure-B series are concerned, the learned District Judge dealt with the same and held that the said documents appear to have been prepared for the purpose of the case and could not be relied upon since the said certificate is not issued in the professional pad of the doctor, the prescriptions does not bear the name of the husband of the patient nor the residential address where the patient was allegedly treated nor the certificate bears the signature of the patient.

14. In so far as Ext. C, the birth certificate issued by the Municipality is concerned which indicates the date of birth of Anant Kumar Sahoo as 6.5.1995, the learned District Judge came to a finding that the present Petitioner appeared in the election case on 15.10.2003 whereafter the Petitioner registered the birth of Anant Kumar Sahoo on 11.11.2003 and obtained the certificate Ext.C on 1.12.2003.

In view of the aforesaid undisputed facts, the learned District Judge held that the present Petitioner had managed to procure the birth certificate of his third child Anant Kumar Sahoo under suspicious circumstances without notice to the present opposite party No. 1 and, therefore, could not be relied upon.

In view of the reasons given above, learned District judge came to the conclusion that the third issue of the Petitioner was born on 6.5.1997, i.e., after the cut off date and not on 6.5.1997 and as a consequence of reaching such a finding declared the Petitioner disqualified u/s 70 of the Orissa Municipal Corporation Act and consequently declared his election illegal and void.

15. At this juncture, it would be extremely relevant to make a reference to a Full Bench judgment of the Apex Court in the case of Syed Yakoob Vs. K.S. Radhakrishnan and Others, wherein the Apex Court laid down the principle as to where and when the High Court should exercise its jurisdiction and issue writ of Certiorari and the same is quoted herein below since it is of great relevance:

The jurisdiction of High Court to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior court or Tribunal as result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however, grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence that would be regarded as an error of law which can be corrected by a writ of certiorari.

A finding of fact recorded by the Tribunal cannot, however, be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led, on a point and the inference of fact to be drawn from the said finding being within the exclusive jurisdiction of the Tribunal, the points cannot be agitated before a writ Court.

16. In the light of the aforesaid discussions, we are of the view that the finding of facts reached by the learned District Judge as a result of appreciation of evidence, cannot be reopened or questioned in a writ proceeding. We are further of the view that in the present case the Petitioner has not made out any ground regarding any apparent error on the face of record nor erroneous refusal to admit any admissible and material evidence nor erroneous admission of inadmissible evidence influencing the impugned finding. We are, therefore, of the view that a finding of fact recorded by the learned District Judge cannot be interfered with inasmuch as adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from such evidence being within the exclusive jurisdiction of the Tribunal. These points cannot be agitated before a writ Court. Accordingly, the writ application is dismissed, but in the circumstances, without costs.

A.K. Ganguly, J.

17. I agree.