

(2003) 07 OHC CK 0043
In the Orissa High Court
Case No : Writ Petition (C) No. 1367 of 2003

Raja Pal

APPELLANT

Vs

Election Officer-cum-Block Development Officer and Others

RESPONDENT

Date of Decision : 02-07-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2
Orissa Panchayat Samiti Act, 1959 — Section 44B, 44F

Citation : (2003) 96 CLT 663 : (2003) 2 OLR 283

Hon'ble Judges : B.P. Das, J;A.K. Patnaik, J

Bench : Division Bench

Advocate : Sanjit Mohanty, P.K. Mohanty-2, S. Singh, S. Singh, for the Appellant; Indrajit Mohanty and B.P. Ray and Additional Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

A. K. Patnaik, J.—The opposite party No: 3 was declared elected as a Panchayat Samiti member of Rairakhol Panchayat Samiti. On 8.3.2002, Election Misc. Case No. 48 of 2002 was filed by the petitioner u/s 44-B of the Orissa Panchayat Samiti Act, 1959 before the learned Civil Judge (Senior Division), Sambalpur challenging the election of opposite party No. 3 as Samiti Member. On 20.9.2002, opposite party No. 3 filed a petition challenging the maintainability of the said Election Misc. Case No. 48 of 2002 on the ground that a sum of Rs. 200/- as security for the cost has not been deposited along with the election petition and the election petition was liable to be dismissed for non-compliance of the provisions of the said Section 44-B of the Act. The petitioner filed an objection to the said petition dated 20.9.2002 filed by the opposite party No. 3 contending inter alia that the provisions of Section 44-B of the Act were complied with. The learned Civil Judge refused to decide the aforesaid question of maintainability of the election misc. case initially by order dated 15.11.2002. Thereafter another petition was filed by the opposite party No. 3 with a similar prayer, but the said prayer was again rejected by the learned Civil Judge by order dated 6.1.2003,

The opposite party No. 3 then filed Civil Revision No. 4 of 2003 before the learned District Judge, Sambalpur and the learned District Judge, passed order on 30.1.2003 admitting the revision and staying the trial of the aforesaid Election Misc. Case No. 48 of 2003. Aggrieved by the said order dated 30.1.2003, the petitioner has filed this writ petition under Articles 226 and 227 of the Constitution.

2. Mr. Mohanty, learned counsel for the petitioner submitted that in the Orissa Panchayat Samiti Act there is no provision similar to Section 86 of the Representation of the People Act 1951 providing for dismissal of an election petition on the ground that the same does not comply with the provisions u/s 117 of the said Act for deposit of costs along with the election petition. Hence, the election petition could not be dismissed by the trial Court for non-compliance of the provision of Section 44-B of the Orissa Panchayat Samiti Act without taking evidence and trying the entire election petition on different issues. He further submitted that under the provisions of Order 14 Rule. 2 of the CPC, the trial Court has to deliver judgment on all issues including issues relating to jurisdiction of the Court or bar to the suit created by any law for the time being in force. He argued that Section 44-B of the Orissa Panchayat Samiti Act provides that an election petition is to be presented together with deposit of two hundred rupees as security for the costs within 15 days after the day on which the result of the election petition was announced. The petitioner's case is that the results of the election were published in the office of the Collector, Sambalpur on 2.3.2002 and the deposit of cost having been made on 18.3.2002 was within time and the election petition cannot be thrown out only on the ground that the provision of Section 44-B of the Panchayat Samiti Act has not been complied with.

3. Mr. Ray, learned counsel for the opp. party No. 3, on the other hand, submitted that the results of the election were announced on 1.3.2002 and the limitation of 15 days is to be counted after 1.3.2002 and so counted the limitation expired on 16.3.2002 and the deposit was made beyond 16.3.2002. Mr. Ray cited a decision of the Supreme Court in K. Kamaraja Nadar Vs. Kunju Thevar and Others, and an unreported judgment of this Court dated 6.9.93 in O.J.C. No. 4025 of 1993 for the proposition that when security deposit is not made along with the election petition, the same has to be decided as a preliminary issue.

4. We have perused the decision of the Supreme Court in K. Kamaraja Nadar v. Kunju Thevar and Ors. (supra) cited by Mr. Ray and we find that the said decision of the Supreme Court has been rendered in a case covered by the Representation of the People Act, 1951 and there is a clear provision in Section 86 of the said Act that where the election petition does not comply with the provisions of Section 117 requiring security deposit along with the election petition, the High Court shall dismiss the election petition, But in the Orissa Panchayat Samiti Act there is no provision similar to Section 86 of the Representation of People Act 1951 providing that where the election petition is

not accompanied by security deposit of Rs. 200/-, the same shall be dismissed by the Election Tribunal. A Division Bench of this Court in a recent decision in the case of Shri Kamalakanta Choudhury v. Shri Indu Bhusan Nayak in W.P.(C) No. 1277 of 2003 has held that in absence of any provision of the Orissa Panchayat Samiti Act that non-deposit of Rs. 200/- as a security together with the election petition would result in dismissal of the election petition, the Court cannot try the same as a preliminary issue. We have also perused the decision of the Division Bench of this Court in Dr. Nirmal Chandra Satapathy v. Jitu Patnaik " Jitendranath Patnaik and Ors. in OJC No. 4025 of 1993 delivered on 6.9.1993 and we find that the said judgment was on the provisions of the Orissa Municipal Act and in the said case, the deposit of costs provided in Section 19(1) of the said Act was made admittedly beyond time and a contention was raised that an application has been filed to permit the petitioner to deposit the security beyond time and the Court had ordered the petition to be taken up on a later date and the High Court held that there was no provision in law empowering the Court to grant extension and that the provision of Section 5 of the Limitation Act did not apply to a petition u/s 19 of the Act. In the present case, on the other hand, the case of the petitioner is that the deposit has been made within the time as provided in Section 44-B of the Orissa Panchayat Samiti Act. The said decision of the Division Bench in the case of Dr. Nirmal Chandra Satapathy v. Jitu patnaik " Jitendranath Patnaik and Ors., therefore, does not apply to the facts of the present case.

5. Even though, there is no provision similar to Section 86 of the Representation of the People Act, 1951, for dismissal of election petition under the Orissa Panchayat Samiti Act on the ground of non-deposit of security of Rs. 200/- along with the election petition, the election petition can still be dismissed, for such deposit of cost beyond the time prescribed u/s 44-B of the Act on the ground that such an election petition was barred by law. If that be so, under the provisions of Order 14, Rule 2 of the CPC, the issue between the parties arising out of deposit or non-deposit within the time prescribed by Section 44-B of the Orissa Panchayat Samiti Act can be tried as a preliminary issue, if it is an issue of law only. This is because Order 14, Rule 2 of the CPC clearly states that where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to the jurisdiction of the Court, or a bar to the suit created by any law for the time being in force. Where, however, the bar created to the election petition is an issue of fact and law, the Court cannot decide the issue as a preliminary issue, but has to decide that issue after recording evidence along with all other issues as is provided in Order 14, Rule 2(1) of the CPC. It is not disputed before us that the said provisions of Order 14 of the CPC have been made applicable to the trial of election petitions under the Orissa Panchayat Samiti Act by Section 44-F of the said Act.

6. We, therefore, dispose of this writ petition by quashing the impugned order dated 30.1.2003 passed by the learned District Judge, Sambalpur in Revision Case No. 4 of 2003 and directing that the learned Civil Judge (Senior Division),

Sambalpur trying the Election Misc. Case No. 48 of 2000 will consider the pleadings of the election petitioner and the opposite party No. 3 and find as to whether the issue between the parties that the election petition is barred by the provisions of Section 44-B of the Orissa Panchayati Samiti Act, 1959 is an issue of law only or one of fact and law and if he finds that it is one of law only, he will decide the same preliminary, but if he finds that it is one of law and fact, then he will decide the same along with all other issues. Orders of the learned Civil Judge on this point passed earlier will not influence the learned Civil Judge while deciding the question. The election petition will be disposed of by the learned Civil Judge (Senior Division), Sambalpur by end of October, 2003.

7. A contention was raised by Mr. Mohanty, learned counsel for the petitioner that a revision u/s 115, CPC is no longer maintainable before the District Judge in view of the amended provision of the CPC. But in view of what we have decided above, it is not necessary to go into this larger question. In a more appropriate case, the aforesaid question will be decided by this Court.

B. P. Das, J.

8. I agree.