

(2005) 06 OHC CK 0013
In the Orissa High Court
Case No : E.L.A. No. 5 of 2003

Ramakanta Dolai

APPELLANT

Vs

Bipin Bihari Hial and Another

RESPONDENT

Date of Decision : 24-06-2005

Acts Referred:

Evidence Act, 1872 — Section 114

Orissa Zilla Parishad Act, 1991 — Section 32, 33, 33(1)

Citation : (2005) 06 OHC CK 0013

Hon'ble Judges : L. Mohapatra, J

Bench : Single Bench

Advocate : Indrajit Mohanty and Debasis Sarangi, for the Appellant; N.C. Pati, S. Misra, A. Das, M.R. Dash, B. Das and N. Singh for Respondents 1 B.K. Kar, M.R. Acharya and S.C. Dash for P. Respondents 1, for the Respondent

Final Decision : Allowed

Judgement

L. Mohapatra, J.—This appeal is directed against the judgment and order dated 6.12.2003 passed by the learned District Judge, Koraput, Jeypore in Misc. Judicial Case No. 36 of 2002 declaring the election of the Appellant as a Member of Koraput Zilla Parishad for Dasamantapur Zilla Parishad Constituency No. I as invalid and illegal, declaring the nomination of Respondent No. 2 as invalid, declaring the nomination of Respondent No. 2 as invalid and further declaring the Respondent No. 1 as elected as Member to Koraput Zilla Parishad form the aforesaid Constituency.

2. Respondent No. 1 filed the election petition before the learned District Judge u/s 32 of the Orissa Zilla Parishad Act for a declaration that the election of the Appellant as Member of the Zilla Parishad, Koraput form Dasamantapur Zilla Parishad Constituency No. I is invalid and illegal. The other prayer relates to Respondent No. 2 who has expired in the meanwhile. Case of the Respondent No. 1 is that in the Panchayati Raj Election of 2002, nomination papers were filed for election to the office of Members to Koraput Zilla Parishad form

Dasamantapur Zilla Parishad Constituency No. I. Respondent No. 1 was a B.J.D. candidate whereas the present Appellant was a Congress-I candidate. On 21st January, 2002, during scrutiny of nomination paper by the designated Election Officer-cum-Sub-Collector, Koraput, Respondent No. 1 placed a written objection for rejection of the nomination paper filed by the Appellant on the ground that he has begotten four children out of whom one was born after the cut off date. According to Respondent No. 1, the Appellant has four children and the first child Parameswar Dolai was born on 30.6.1981, the second child on 6.8.1986, the third child in 1991 and the fourth child, a daughter, on 13.2.1996. The specific case of the Respondent No. 1 was that the fourth child was born after the cut off date and therefore the Appellant was disqualified to contest for the post. However, the objection raised by Respondent No. 1 was not accepted and the election took place on the 21st of February, 2002. The Appellant was declared elected on 1.3.2002. The election petition was filed for declaring the election of Appellant as invalid only on the above ground.

3. The Appellant filed written statement stating therein that his elder brother Ramachandra Dolai had two children, namely, Parameswar Dolai and Santosh Dolai. The said Ramachandra Dolai expired 14 years back and after his death, said two sons were brought up under the care and control, of the Appellant. It was also the case of the Appellant that he has got two daughters, namely, Purnima Dolai and Bhagyashree Dolai and therefore he was not disqualified to contest the election. In the election petition, Respondent No. 1 examined two witnesses on his behalf and the Appellant examined two witnesses. Documents such as School Admission Registers for different years were also exhibited. The learned District Judge on analysis of evidence found that the Appellant had four children and one child having taken birth after the cut off date, he was disqualified to contest in the election and accordingly declared his election as invalid and illegal.

4. Shri Indrajit Mohanty, learned Counsel appearing for the Appellant, submitted that the only question that is required to be determined in the appeal is as to whether the Appellant had four children and as to whether the fourth child was born after the cut off date. Referring to the evidence adduced on behalf of the parties, it was contended by Shri Mohanty that there is no material to show that the first two children referred to in the election petition are of the Appellant and rather, on the other hand, the evidence adduced on behalf of the Appellant clearly indicate that the first two children referred to in the election petition are of Ramachandra Dolai who happens to be the elder brother of the Appellant. It is also contended by Shri Mohanty that since the Appellant had only two daughters, even if it is accepted that the second child was born after the cut off date, he cannot be declared as disqualified to contest in the election. The learned Counsel for the Respondent No. 1, on the other hand referring to the evidence on record, submitted that materials have been placed before the trial Court to show that the Appellant had four children and the last child was born after the cut off date and the same having been accepted by the trial Court, there is hardly any scope for

this Court to interfere in this appeal.

5. On consideration of the submissions made by the learned Counsel for both the parties, it appears that the only question that requires to be determined in this appeal is as to whether the Appellant had four children and as to whether the last child was born after the cut off date.

6. Election Petitioner-Respondent No. 1 examined himself as P.W.1. In his deposition, he has stated that the names of the four children of the Appellant are Parameswar, Santosh, Purnima and Kumari Bhagyashree and that they were born on 30.6.1981, 6.8.1986, 1991 and 13.2.1996 respectively. He has further stated that out of the four children only Santosh died a week before his examination and the dates of birth of all the four children are available in the Births and Deaths Register maintained at Dasamantapur P.H.C. as well as in the School Admission Register, Dasamantapur U.P. School. In cross-examination, he stated that though he has documents to show that the Appellant has got four children, he has not obtained those documents. He also denied the suggestion that Parameswar and Santosh Kumar are the sons of Ramachandra Dolai. The Headmaster of the concerned school was examined as P.W.2. He was examined on being summoned by the Court and produced the School Admission Registers. Referring to the School Admission Registers, he stated that one Parameswar Dolai, son of Ramakanta Dolai (Appellant) was admitted into the school on the 29th of July, 1986 and his death of birth has been recorded as the 30th of June, 1981. This entry has been marked as Ext. 1. He also proved Anr. register Ext. 2 for the years 1990, 1991 and 1992 and stated that Santosh Kumar Dolai was admitted to the school on 20th of July, 1991 and he was described as the son of the Appellant. Ext. 3 is Anr. Admission Register of the school for the years 1993-2000 and referring to the said register, this witness stated that Purnima Dolai, daughter of the Appellant took admission on the 20th of July, 1998 in the said school. However, this witness did not say anything about the fourth child. O.P.W.1 is the Appellant himself. In his deposition, he has stated that he has two children, the eldest one being a daughter. According to him, the first child was born in the year 1991 and the second child who is also a daughter was born in the year 1993. He has also stated that Parameswar and Santosh are the sons of his elder brother Ramachandra Dolai and since Ramachandra Dolai expired, he had admitted his children into the school citing himself as their father. He has also stated that Ramachandra Dolai died in the year 1995. The other witness examined on behalf of the Appellant also supported the stand taken by the Appellant in his evidence.

7. Shri Indrajit Mohanty, learned Counsel for the Appellant, referring to the evidence adduced on behalf of the parties, submitted that when an allegation is made by the election Petitioner, the burden of proof lies on him and the election Petitioner had not discharged the aforesaid burden by producing the documents before the Court to substantiate the allegations made in the election petition. According to Shri Mohanty, no document was produced on behalf of the election

Petitioner in support of his claim that Parameswar and Santosh were born on the 30th of June, 1981 and 6th of August, 1986. On the other hand, there is evidence on record to show that Ramachandra Dolai had expired by the time Parameswar and Santosh took admission in the school and therefore the stand taken by the Appellant should have been accepted. Apart from the above, it was also contended by the learned Counsel for the Appellant that so far as the fourth child Kumari Bhagyashree is concerned, no document was placed before the Court to show that she took birth in the year 1996, as alleged, and in the absence of any evidence to support such a plea, the statement of the Appellant that Bhagyashree was born in the year 1993 should have been accepted. It appears from the judgment that the trial Court framed a specific issue with regard to the date of birth of Bhagyashree. From the evidence of P. Ws. 1 and 2 it is clear that neither the election Petitioner (P.W.1) could produce any document to show that Bhagyashree was born after the cut off date nor could the Headmaster of the institution (P.W.2) produce any document to show the date of birth of Bhagyashree. Therefore, it is clear that there is absolutely no material on record to show the date of birth of Bhagyashree. In this connection, reference may be made to a decision of this Court in the case of Ajit Prasad Narayan Singh Vs. Smt. Nandini Satpathy, . This Court in the said judgment observed that when parties have framed a specific issue as to whether the Petitioner was an Elector or not and were aware that it involved a substantial question, the Petitioner cannot rely upon the rule of pleadings to infer admission in substitution of lack of evidence. Illustration (g) u/s 114 of the Indian Evidence Act also prescribes as follows:

114. Court may presume existence of certain facts - The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume-

(a) to (f)xx xx xx

(g) that evidence which could be and is not produced would, if produced, be unfavourable to the persons who withholds it.

Referring to the aforesaid provision, it is contended by Shri Mohanty that having taken a specific stand with regard to the date of birth of Kumari Bhagyashree after the cut off date and the election Petitioner having not produced any evidence in support of the same, the presumption should be that the child was born before the cut off date. Since referring to the evidence on record I have already held that there is absolutely no material placed on behalf of the election Petitioner to show that Kumari Bhagyashree was born after the cut off date, I am inclined to accept the evidence adduced on behalf of the Appellant to show that Kumari Bhagyashree was born in the year 1993. Orissa Act 17 of 1993 has

brought in an amendment to Section 33 of the Zilla Parishad Act, 1991 by way of a Proviso which prescribes that disqualification under Clause (w) of Section 33(1) of the Act shall not apply to a person who has more than two children on the date of commencement of Act 17 of 1993. It further prescribes that the disqualification of having more than two children shall also not apply in case where an additional child is born within one year from the date of commencement of the amendment Act of 1993. Therefore, having held that evidence adduced on behalf of the Appellant that Bhagyashree was born in 1993 is acceptable, even if it is accepted that the Appellant had four children, the disqualification clause i.e. Section 33(1)(w) does not apply to the Appellant as all the children were born before the cut off date. In view of the above, no child having taken birth after the cut off date, the impugned judgment and order of the learned District Judge is likely to be set aside.

8. I accordingly allow the appeal, set aside the impugned judgment and order of the trial Court and hold that the Appellant was rightly declared elected as Member of the Zilla Parishad from Dasamantapur Zilla Parishad Constituency No. 1. There shall be no order as to costs.