

(2017) 01 OHC CK 0025
In the Orissa High Court
Case No : 20843 of 2016

Sananda Barik & another

APPELLANT

Vs

State Election Commissioner, State of Odisha & others

RESPONDENT

Date of Decision : 03-01-2017

Acts Referred:

Representation of the People Act, 1950, Section 20, Section 18 -
Orissa Gram Panchayat Election Rules, 1965, — Rule 6(1), Rule 7, Rule 7(1), Rule 7(2), Rule 6(2) -

Citation : (2017) 01 OHC CK 0025

Hon'ble Judges : Biswanath Rath

Bench : SINGLE BENCH

Advocate : H.S.Mishra, A.K.Mishra, A.K.Tripathy, R.Dash, B.Bhuyan

Judgement

1. This is a writ petition filed by petitioners, who are husband and wife, residents of Ward No.4, Village-Janmura in the district of Subarnapur challenging the order of the competent authorities for non-inclusion of their name in the voter list meant for village-Janmura under Janmura Grama Panchayat of Sonapur Panchayat Samiti, 2016. The writ petition also involved the order passed by the appellate authority involving the above issues.

2. Petitioners case as narrated in the writ petition is that the notification for Panchayat reorganization ignored the formation of Janmura Grama Panchayat in the district of Subarnapur, villagers of Janmura Grama Panchayat approached this Court in W.P.(C) No.14170 of 2016. Following the direction contained in W.P. (C) No.14170 of 2016, a new Grama Panchayat in the name of Janmura Grama Panchayat has been created by bifurcating the previous Kalapathara Grama Panchayat. For the creation of new Janmura Grama Panchayat while attending to the Government action for preparation of area/boundary of different wards vis-?-vis reservation along with final voter list of Grama Panchayat was taken place, steps were taken for addition, deletion and correction in the voter list in a ward wise manner in the Grama Panchayat, Panchayat Samiti as well as Zilla Parisad

election. Considering that petitioners were registered as voters of Constituency No. 65 of the Sonepur Assembly Constituency in the voter list prepared on 1.1.2016 and since the petitioners were resident of village Janmura, desired to delete their names from voter list of Sonepur Assembly Constituency with the address Ward No.2 attempts were made to add their names with the address at village-Janpura under the then Kalapathara Grama Panchayat. Receiving application in the above regard, the Returning Officer-cum- Sub-Collector, Subarnapur accepted the application of the petitioners and changed their address from Ward No.2 of the Sonepur Municipality area to the address of Ward No.4 of village-Janmura under Kalapathara Grama Panchayat and a corrected voter list for the Assembly Constituency for 2017 was prepared clearly indicating the names of the petitioners as voters of village-Janmura vide Annexure-2. It is when the revision of voter list of Grama Panchayat keeping in view the Grama Panchayat election is concerned, taken place following a direction under Annexure-1 for preparation of voter list for the purpose of Panchayat Election, as the petitioners did not find their name in the draft Electoral Roll, applied in appropriate form to the opposite party no.4 to add their names in the voter list to be finalized for Janmura Grama Panchayat. It is asserted that receipt of application, both the petitioners were assured that necessary correction will be made during preparation of revised final voter list and it is alleged that the petitioners were surprised and shocked to notice that their names did not find place in the final voter list by virtue of an order refusing to add their names on the premises that petitioners have not resided in the village for over six months. It is alleged that there was neither any inquiry nor involvement of the petitioners before passing such final order and thus being aggrieved by the order of non-inclusion of their name in the voter list, an appeal was preferred before the opposite party no.3 appearing at Annexure-3 which also got dismissed and dismissal of the appeal paved way for the present writ petition.

3. Assailing the impugned orders passed by the Original Authority as well as the Revisional Authority under Annexure-4, Sri H.S. Mishra, learned counsel appearing for the petitioners contended that the impugned orders have been passed with ulterior motive and under the influence of the political rivals just to see that petitioners are kept away from the voting. The original order was passed not even giving opportunity of hearing to the petitioners. Discussions, grounds and reasons of the opposite party no.3 in the impugned order under Annexure-4 remain completely beyond the scope of preparation of voter list and law governing the field. It is also alleged that the decision for exclusion of the petitioners from the voter list as well as the impugned orders also remain contrary to the guideline fixed for the purpose by the election Commissioner issued vide Annexure-1. It is contended by Sri H.S. Mishra, learned counsel that when on the very same ground Electoral roll for the Assembly Constituency has been altered, there was no reason for rejection of the claim of the petitioners in the matter of inclusion of their names in the voter list for the Panchayat Samiti purpose. It appears two different principles have been adopted by the competent

authority while preparing the voter list for Assembly Constituency and the other for preparation of voter meant for Panchayat Samiti or the Grama Panchayat, which is not permissible in the eye of law and when the petitioners name is already registered as voters of Janmura village in the voter list of Sonapur Assembly Constituency, there is no reason for rejecting the claim of the petitioners while preparing the voter list meant for Panchayat Samiti or the Grama Panchayat. The orders of the authority also violate the instruction issued by the opposite party no.1 under Annexure-6. It is under the above circumstances, the petitioners claimed for interference in the impugned orders and seeks a direction in the matter of inclusion of petitioners name in the voter list of Janmura village under Sonapur block for the ensuing Grama Panchayat Election.

4. Per contra, opposite party nos.2 and 3 making a reference to their pleadings in the counter affidavit submitted inter alia that the petitioners are not ordinary residents of Janmura village, as clearly evident from the documents such as Paribar Bibarani Register maintained by the Anganwadi Workers of Janmura Kha Anganwadi Centre and the Anganwadi Worker of Harijan Pada-1 of Ward No.2 of Sonapur Municipality. Further the certificate furnished by petitioner no.1 involving house rent allowance in the D.R.D.A., Subarnapur, Address in the Pass Book of S.B.I., Sonapur vide Account No.11404586460 remaining active till the date of filing the affidavit establishes petitioner no.1 is an employee of D.R.D.A. Subarnapur, no Due Certificate of Utkal Gramya Bank, Sonapur clearly establishes the petitioners address otherwise. In submitting above, opposite party nos.2 and 3 also filed the documents indicated hereinabove as Annexures A/3 to E/3 to the counter affidavit. It is further contended by the opposite party nos.2 and 3 that petitioners being still continuing as electors in Ward No.2 of Sonapur Municipality as per the voter list published by the Election Commissioner in the month of June, 2016 vide Serial Nos.482 and 483 respectively in part no.172, their claim for registering their name in the Electoral List of Grama Panchayat is not justifiable. It is contended by the learned Additional Government Advocate that as per the instruction of the State Election Commission, the name of a voter cannot be enrolled in two voter list simultaneously as barred under Section 18 of the Representation of Peoples Act, 1950. Establishing the above, opposite party nos.2 and 3 also filed a copy of the instruction/guideline of the Election Commission as Annexure-G/3. Further looking to the provision contained in Section 20 of the Representation of Peoples Act, 1950. It is claimed that a person cannot be deemed to be a voter on the premises of being an ordinarily resident in a particular Constituency or that he owns a house in that Constituency. It is next contended that the Electoral List published by the State Election Commission during January, 2016 being in force shall be the basis for correction/preparation of the preliminary ward wise Electoral Roll following the State Election Commission find place at Annexure-H/3. It is also submitted that the contents in the Assembly Electoral Roll for the year, 2017 is immaterial so far as preparation of the Electoral Roll for the

Panchayat Samiti or the Grama Panchayat is concerned. Referring to the provision contained in Rule 6(2) of the Orissa Grama Panchayat Election Rules, 1965, learned Additional Government Advocate submitted that any person who is qualified under the provision of Representation of Peoples Act, 1950 or the Orissa Grama Panchayat Act, 1964 to be registered as a voter in any Grama, shall be registered in the Electoral Roll of a Ward and name of a person, who is disqualified under the aforesaid provisions shall be liable for removal from the Electoral Roll of the said Ward. Answering the allegation against the rejection of the claim of the petitioners by opposite party no.4, learned Additional Government Advocate submitted that following paragraph 7.1 of the communication dated 18.11.2016 issued by the State Election Commission, the claims and objections under Rule 7(1) is to be decided in summary manner and from the records it appears that the opposite party no.4 had sufficient reason to believe that the petitioners are not ordinary residents of Janmura Grama Panchayat, Ward No.4 and thus contended that there is no illegality in the order passed by the opposite party no.4. Learned Additional Government Advocate also raises an objection in the matter of filing of the writ petition by both the petitioners on the premises that there being two individual claims vide Form No.16 by both Damayanti Barik as well as Sananda Barik and two independent orders being passed by the E.R.O., the appeal being filed by Sananda Barik alone and the decision being passed only involving Sananda Barik, writ petition at the instance of both the petitioners is not maintainable. It is under the aforesaid premises, Sri Bhuyna, learned Additional Government Advocate contended that there is no scope for interference in the order passed in appeal and the writ petition should thus be dismissed. Considering the objection of Sri Bhuyna, learned Additional Government Advocate that looking to the impugned order under Annexure-4 involving only petitioner no.1, the writ petition is not maintainable at the instance of both the petitioners, this Court on perusal of the case record involving the dispute being produced by the State finds both the petitioner nos.1 and 2 filed independent applications for inclusion of their name in the voter list vide Form No.16 and there has been also two independent orders by the E.R.O., Janmura on each of the application on 17.11.2016. Now looking to the appeal memorandum, at Annexure-3, this Court finds there is no doubt that Annexure-3 is an appeal memorandum only at the instance of Sananda Barik. Looking to the statements made therein and the prayer, it leaves no doubt that this was an individual appeal but making a claim for both the petitioners. For the filing of appeal by Sananda Barik alone in his signature without having any indication of joint representation in the appeal or authority of any sort, this Court finds the appeal memorandum at Annexure-3 cannot be treated to be an appeal at the instance of both the petitioners. Consequently, the appeal order remaining confining to the petitioner no.1, this Court finds force in the submission of the learned Additional Government Advocate and thus restricting the writ petition to the petitioner no.1 only. This Court makes it clear that dismissal of the present writ petition shall not stand as a bar for preferring appeal and in the event, an appeal is preferred by the petitioner No.2, the same

shall be decided on its own merit.

5. Before proceeding to decide the issues involved herein, this Court feels it appropriate to take note of the provisions, relevant for the purpose, which are reflected as herein below: Rules 6(1), 6(2), 7(1) and 7(2), of Orissa Grama Panchayat Election Rules, 1965:

Rule 6.(1) No person shall be eligible to be registered in the electoral roll for more than one ward in any Grama.

Rule 6.(2) Any person who is qualified under the provisions of the Representation of the People Act, 1950 or the Orissa Grama Panchayats Act, 1964 to be registered as a voter in any Grama, shall be eligible to be registered in the electoral roll of a ward and the name of a person who is disqualified under the provisions of the said Acts shall be liable for removal from the electoral roll of the said ward:

Rule 6(3). Any person who claims to be entitled to be registered as an elector and whose name is not entered in or entered in an incorrect place or manner or with incorrect particulars in the preliminary electoral roll and any person whose name is on the roll and objects to the inclusion of his name or the name of any other person in the electoral roll may prefer a claim in Form No.16 or an objection in Form 17 to the Electoral Registration Officer for consideration any necessary corrections.

Rule 7(1) The Electoral Registration Officer shall sit at the place and on the date fixed under Sub-Rule(3) of the Rule 5 and shall hold a summary enquiry of all the claims and objections.

Rule 7(2). The electoral Registration Officer may make such further inquiry as he may deem fit with regard to claim or an objection.

Rule 27(3) of the Orissa Grama Panchayat Act, 1964:

In the absence of any provision in this Act or the rules made thereunder, the provisions of the Representation of the People Act, 1950 and the Representation of the People Act, 1951 shall mutatis mutandis apply for the purposes of the election to Grama Panchayats in the following matters, namely:

- (i) preparation, revision and updating of electoral rolls;
- (ii) appointment of Electoral Registration Officers, Presiding Officers and Polling Officers;
- (iii) qualifications and disqualifications for registration as voter;
- (iv) such other matters which have to be, or may be required to be, dealt with for the purposes of conducting free and fair election.

Section 18 and Section 20 of the Representation of People Act, 1950.

Section 18. No Person to be registered more than once in any constituency.-No person shall be entitled to be registered in the electoral roll for any constituency more than once.

Section 20. Meaning of "ordinarily resident".

(1) A person shall not be deemed to be ordinarily resident in a constituency on the ground only that he owns, or is in possession of, a dwelling house therein.

(1-A) A person absenting himself temporarily from his place of ordinary residence shall not by reason thereof cease to be ordinarily resident therein.

(1-B) A member of Parliament or of the Legislature of a State shall not during the term of his office cease to be ordinarily resident in the constituency in the electoral roll of which he is registered as an elector at the time of his election as such member, by reason of his absence from that constituency in connection with his duties as such member.

(2) A person who is a patient in any establishment maintained wholly or mainly for the reception and treatment of persons suffering from mental illness or mental defectiveness, or who is detained in prison or other legal custody at any place, shall not by reason thereof be deemed to be ordinarily resident therein.

(3) Any person having a service qualification shall be deemed to be ordinarily resident on any date in the constituency in which, but for his having such service qualification, he would have been ordinarily resident on that date.

(4) Any person holding any office in India declared 6 by the President in consultation with the Election Commission to be an office to which the provisions of this sub-section apply, (* * *) shall be deemed to be ordinarily resident (***) on any date in the constituency in which, but for the holding of any such office (* * *), he would have been ordinarily resident (* * *) on that date.

(5) The statement of any such person as is referred to in sub-section (3) or sub-section (4) made in the prescribed form and verified in the prescribed manner, that [but for his having the service qualification] or but for his holding any such office [* * *]as is referred to in sub-section (4) he would have been ordinarily resident in a specified place [* * *] on any date, shall, in the absence of evidence to the contrary, be [accepted as correct].

(6) The wife of any such person as is referred to in subsection (3) or sub-section (4) shall if she be ordinarily residing with such person [* * *] be deemed to be ordinarily resident on [***] in the constituency specified by such person under subsection (5).

(7) If in any case a question arises as to where a person is ordinarily resident at any relevant time, the question shall be determined with reference to all the facts of the case and to such rules as may be made in this behalf by the Central Government in consultation with the Election Commission.

(8) In sub-sections (3) and (5) "service qualification" means-

(a) being a member of the armed forces of the Union; or

(b) being a member of a force to which the provisions of the Army Act, 1950 (46 of 1950), have been made applicable whether with or without modifications; or

(c) being a member of an armed police force of a State, who is serving outside that State; or

(d) being a person who is employed under the Government of India, in a post outside India.

Reading of the above provisions make it clear that a person is to be registered as a voter in one ward in any grama, a person before being registered as a voter of a ward or grama must satisfy the eligibility required either under the Representation of People Act or the Grama Panchayat Act. Non inclusion of name in the voter list authorizes a person to apply registration of his name as a voter by filing Form 16 which is required to be considered by E.R.O. after providing opportunity of hearing and the meaning of ordinary resident. The case at hand clearly demonstrates involvement of consideration of Form 16 by petitioner no.1

6. Now coming back to the facts involved in the case, this Court from the pleadings and the submissions of respective parties, finds through Annexure-1, a notification of the State Election Commission dated 18.10.2016 clearly bears that the intention was to prepare the correct voter list with inclusion, exclusion, correction and change in the matter of preparation of a voter list word-wise of the Panchayat Samiti or the Zilla Parishad and the basis for such correction was the information available as on 1.11.2016 with a specific input that persons completing 18 years of age as on 1.11.2016 can apply in appropriate form for inclusion of their name in the voter list prescribed under the Orissa Grama Panchayat Election Rules, 1965. Similarly, looking to the further instruction issued by the State Election Commission dated 19.10.2016 vide Annexure-6, it appears the notification had the following directions: "A Procedure for disposal of application under Rule 7(1).

xxx xxx xxx

1.2 Individual application should only be accepted.

However, if individual application relating to the members to the same household, i.e. same family, are presented together, they may be accepted.

2. The ERO shall dispose of all claims and objections in a summary manner and shall record his decision thereon. For this, he may take assistance of any other person whom he considers fit.

2.1 The ERO should personally hear the claimant or the objector as the case may be, and shall record his decision in each case and the brief reason for such decision.

7. From the reading of the aforesaid, it makes clear that requirement not only stipulates individual application or in case of family members, a joint application, but the ERO is also required to give a personal hearing to the claimants or the objector before recording his decision in each case.

8. Part IX of the Constitution of India deals with Panchayats and Article 243 B deals with constitution of Panchayats whereas Article 243 K of the Constitution deals with Election to the Panchayats and 243 K(4) enables State's Legislature by law make provision with respect to all matters relating to or in connection with elections to the Panchayats which gave rise enactment of Orissa Gram Panchayat Election Rules 1965 in exercise of power conferred by Section 150 read with Section 27 of the Orissa Gram Panchayat Act, 1964. Rule 5(1) the Electoral Registration Officer to split up or came to be split up electoral roll of and Assembly Constituency in separate electoral rolls for every ward in a Gram and the electoral roll so prepared shall be the preliminary electoral roll for the ward. Rule 5(1) of the Rule 65 mandates the preliminary electoral roll of the ward so prepared under Sub-Rule (1) be published by the Electoral Registration Officer at a conspicuous place at the head quarter of the Gram Panchayats together with a notice in form No.-2 stating the date of objection or claims may be received and the place and date on which enquiries shall be taken up. Rule -6 of the Orissa Grama Panchayat Rules, 1965 envisaged no person shall be eligible to be registered for more than one ward in any grama and any person, who is qualified under the provision of the Representation of the People Act, 1950 or the Orissa Grama Panchayat Act, 1964 to be registered as a voter in any grama shall be eligible to be registered in the Electoral Roll of a ward and following Rule 6(3), a person whose name is not included in the voter list may prefer the claim in form No.16 or an objection in form No.17 to the Electoral Registration Officer for consideration of any necessary correction. Under Rule 7 of the Orissa Grama Panchayat Rules, 1965, the Electoral Registration Officer is required to make an inquiry as deems fit and following the instruction of the State Election Commission dated 18.10.2016. Particularly under Clause 2.1 the Electoral Registration Officer should personally hear the claimant or the objector, as the case may be and shall record his decision in each case and the brief reason for such decision.

9. Thus, from the above, it is clear that there should be a separate Electoral Roll for each Panchayat independent of a Electoral Roll meant for Assembly Constituency. The only condition required for inclusion of a person in such voter list is the Electoral roll not only prepared for every ward but with a rigid condition that no person shall be eligible to be registered in the Electoral Roll for more than one ward in any Grama. Therefore, the submission of Sri B.Bhuyan, learned Additional Government Advocate that basis of such preparation of Electoral Roll is the basis contained in 2016 Electoral Roll remain unfounded.

10. Further, considering the case at hand, this Court observes the petitioner no.1

as the writ petition is confined to petitioner no.1 alone, for the reason of no appeal at the instance of the petitioner no.2 thereby the writ petition remain not maintainable so far the petitioner no.2 is concerned, while making entry of his name being a voter from ward No.4 in Janmura Grama clearly appearing from Form No.16 available from the records produced by the State during course of hearing, even though the Electoral Registration Officer entered into an inquiry and passed the order negating the claim of the petitioner no.1 but then the proceeding was concluded without giving a personal hearing to the petitioner no.1, as required under Clause-2.1 of Annexure-6 of the writ petition. From the variety of records produced by the petitioner no.1 for satisfaction of his claim, it appears the petitioner had already got a correction in the Electoral Roll so far it relates to Assembly Constituency is concerned again on the basis of same claim. Now coming to assess the order passed by the appellate authority vide Annexure-4, it appears the appellate authority has a clear recording that besides the claim of the petitioner no.1 under Form No.16, there is also affidavit of 36 villagers of the Janmura Grama supporting the entry of the name of the petitioner no.1 in the voter list meant for particular ward. It appears, there is no proper consideration of the petitioner no.1's case by the Electoral Registration Officer from the point of view of his claim supported with so many affidavits of the same Grama and a set of documents as well. Further, from the reason assigned in paragraph 2 of the second page of the impugned order, it appears the appellate authority also turned down the claim of the petitioner no.1 under the premises that following the guideline of the State Election Commission dated 18.10.2016, basis for preparation of the Electoral Roll for the Panchayat is the information available from the voter list, 2016 meant for Assembly appears to be wholly contrary to the instruction given by the State Election Commission dated 18.10.2016 available at Annexure-1, which only indicates the information as on 1.11.2016 will be the base for considering such claims. The appellate authority appears to have misunderstood the instructions under the guideline under Annexure-1. For no opportunity of hearing to the petitioner no.1 and for wrong applications of the conditions attached in the instruction issued by the State Election Commission under Annexure-1 and Annexure-6 and for the action of the Electoral Registration Officer as well as the appellate authority contrary to the statutory provisions such as Rule 6 of the Orissa Grama Panchayat Election Rules, 1965, this Court finds the impugned orders are not sustainable.

11. Considering the claim of the petitioner no.1 remains unresolved, this Court feels it appropriate to remit the matter back to the Electoral Registration Officer to consider the application of the petitioner no.1 in Form No.16 and decide the same not only taking into consideration the materials produced by the petitioner but also giving an opportunity of hearing to the petitioner no.1. This Court further directs the petitioner no.1 to appear before the Electoral Registration Officer along with a certified copy of this judgment within a period of 10 days hence and the Electoral Registration Officer is directed to consider the case of the petitioner no.1 afresh and conclude the proceeding within a period of three

weeks thereafter. No cost.