

(2005) 03 OHC CK 0011

In the Orissa High Court

Case No : Writ Petition (Civil) No. 4613 of 2004

Sri. Mangal Charan Behera

APPELLANT

Vs

Sri. Banamali Biswal and Others

RESPONDENT

Date of Decision : 03-03-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2(2)
Limitation Act, 1963 — Section 5
Orissa Grama Panchayat Act, 1964 — Section 31(1)

Citation : (2005) 03 OHC CK 0011

Hon'ble Judges : S.B. Roy, C.J;M.M. Das, J

Bench : Division Bench

Advocate : Manoranjan Panda, M.K. Nayak, B.P.B. Bahali and C. Mohapatra, for the Appellant; P.K. Mohanty and P.K. Khuntia and A.G.A., for the Respondent

Final Decision : Dismissed

Judgement

M.M. Das, J.—The Petitioner in this writ application has sought for quashing the order under Annexure-1 and for directing disposal of Election Misc. Case No. 1 of 2003 pending before the Civil Judge (Junior Division), Balasore within a stipulated period. The Petitioner was the returned candidate being elected as a Sarpanch of Markona Gram Panchayat situated under Simulia Block in the district of Balasore. The opp.party No. 1 filed Election Misc. Case No. 1 of 2003 before the Civil Judge (Junior Division), Balasore under the provisions of the Orissa Gram Panchayat Act. The admitted case of the parties is that the election was held on 19.2.2002 and the results were declared on 21.2.2002. The election petition was filed by opp.party No. 1 on 15.4.2003 alongwith an application u/s 5 of the Indian Limitation Act, 1963. It appears that after filing of election petition along with the application for condonation of delay, the learned Civil Judge (Junior Division), Balasore condoned the delay by exercising power under the second proviso to Section 31(1) of the Orissa Gram Panchayat Act and issued notice to the present Petitioner and other opposite parties therein. It further transpires that the present Petitioner appeared in the said election case on

1.8.2003 and subsequently filed his objection/written statement to the Election Misc. Case. It also further transpires that the writ Petitioner took a stand in his objection that the Election Misc. Case is barred by time. Thereafter, the Petitioner filed an application under Order 14 Rule 2(2) of the Code of Civil Procedure, to decide the question of maintainability of the Election Misc. Case on the ground of limitation, as a preliminary issue. The said application having been rejected by the Civil Judge (Junior Division), Balasore, by this order dated 15.3.2004 (Annexure-1), the Petitioner has preferred the present writ petition.

2. Learned Counsel for the Petitioner submits that admittedly the election petition having been filed with a long delay, i.e. beyond more than one year from the date of expiry of the period of limitation, the learned Court below should have allowed the application filed by the Petitioner and should have decided the question of maintainability of the Election Misc. Case, on the ground of limitation, as a preliminary issue.

3. Learned Counsel for opp.party No. 1, on the contrary, submits that the Election Tribunal having condoned the delay in filing the Election Misc. Case, by order dated 9.5.2003 and the writ Petitioner having not challenged the said order, it is not open for the writ Petitioner to subsequently challenge the said order, by which, the delay in filing the application was condoned. He further submits that the order impugned in this writ application is also unassailable in view of the provisions of Order 14 Rule 2(2) Code of Civil Procedure, which provides that where issues of both law and fact arise in the same suit, issues relating to jurisdiction of the Court or a Bar to the suit created by any law for the time being in force, can only be decided as a preliminary issue, if the same can be decided on an issue of law only. He further submits that in the present case, the question of lack of jurisdiction of the trial Court does not arise and the question with regard to the bar of the suit under the law of limitation being a mixed question of fact and law cannot be tried as a preliminary issue under Order 14 Rule 2(2), CPC For this proposition, learned Counsel for opp.party No. 1 relied upon the decision in the case of Puranda Behera Vs. Dr. Narayan Shankar Behera, . This Court in the said decision relying upon the decision in the case of Madhabananda Ray and Another Vs. Spencer and Company Ltd., and in the case of Ram Saraf v. Mani Dei and Anr. ILR 1970 Cut 152 held as follows:

While attempt should be taken to avoid protracted litigation, yet unless point in issue goes to the very root of jurisdiction of the Court or bar created under a statute, piecemeal trial has to be avoided and adjudicated as imperated under Order 14, Rule 2 of the Code has to be undertaken.

4. Learned Counsel for the Petitioner submitted that it is well settled in law that an ex parte order by which delay in filing the application is condoned, is always a provisional order and the said order is always subject to reconsideration after appearance of the adversary and an objection to the said order being raised. For the above contention, learned Counsel for the Petitioner has relied upon the decisions in Md. Abdul Kasim v. Chaturbhuj Sahai AIR 1922 Pat 47 and Municipal

5. We do not find it necessary to reiterate the position of law that when delay in filing an application is condoned before appearance of the opposite parties, in a case, either by exercising the power conferred u/s 5 of the Limitation Act or by exercising such power provided in any special statute, such order cannot be termed as a final order and it is always open for the opposite parties to re-agitate the point of limitation and in the event such objection is raised by the opposite parties, the said ex parte order, condoning the delay, already passed, is to be reconsidered and determined finally.

6. In this view of the matter, we are of the view that the issue regarding non-maintainability of the election petition on the ground of limitation has to be gone into by the Election Tribunal and while deciding the said issue, the Election Tribunal has to reconsider the order dated 9.5.2003 by which the delay in filing the election petition was condoned ex parte before issuance of notice to the opp.parties in the said election petition.

7. Now coming to the moot point raised in this writ application with regard to the order under Annexure-1, which is impugned in this writ application, it appears therefrom that the learned Civil Judge (Junior Division), taking note of the contentions raised by the writ Petitioner in his application and the objection thereto filed by the present opp.party No. 1, has rejected the said application by a cryptic order without assigning any reason therefore, by simply stating that he is not satisfied with the grounds mentioned in the petition.

8. On considering the submissions made and the provision of law under Order 14, Rule 2(2), CPC and the decision cited by the learned Counsel for the opp.party No. 1 though we are of the view that rejection of the petition under Order 14, Rule 2(2), CPC by the impugned order under Annexure-1, cannot be assailed as contrary to law but we feel it expedient to dispose of this writ petition with the following directions:

(i) The learned Civil Judge (Junior Division), Balasore shall frame a specific issue with regard to the maintainability of the election petition on the ground of limitation along with other issues that may be framed.

(ii) The learned Civil Judge (Jr. Divn.) while pronouncing his judgment on the election petition after trial of the same, shall first address itself, in the judgment, to the issue regarding maintainability of the application on the question of limitation.

(iii) During trial of the Election Misc. case, the writ Petitioner who is the Opp. Party No. 1 in the Election Misc. case, shall be given opportunity to rebut the grounds set-forth by the election Petitioner explaining the delay in filing the Election Misc. case, as stated in his application for condoning the delay.

(iv) If the learned Civil Judge (Jr. Divn.) while deciding the issue on the question of maintainability of the election petition on the ground of limitation, comes to a

finding that the delay in filing the Election Misc. Case has been sufficiently explained, he may, by exercising the power conferred on him under the second proviso to Section 31(1) of the Orissa Grama Panchayat Act, hold that the delay has been sufficiently explained and then proceed to decide the other issues in the Election Misc. Case, in the judgment.

(v) In the event the learned Civil Judge (Jr. Divn.) comes to a finding that the election Petitioner has failed to show that there is sufficient cause for condoling the delay in filing the Election Misc. Case, he on finding that the Election Misc. Case is barred by time, will not be required to give findings on other issues.

9. The Election Misc. Case being of the year 2003, the learned Civil Judge (Jr. Divn.), Balasore shall make all endeavour to dispose of the same within a period of six months from the date of communication of this order or production of a certified copy of this order by either of the parties before him.

10. The parties to the Election Misc. Case are directed to co-operate in the proceeding for disposal of the same.

With the above directions, the writ application is disposed of.

S.B. Roy, C.J.

11. I agree.