
(2007) 07 OHC CK 0051
In the Orissa High Court

Suresh Barik

APPELLANT

Vs

Purna Chandra Rout and Others

RESPONDENT

Date of Decision : 25-07-2007

Acts Referred:

Constitution of India, 1950 — Article 227
Evidence Act, 1872 — Section 50

Citation : (2007) 104 CLT 639 : (2007) 2 OLR 537 Supp

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

Bench : Division Bench

Final Decision : Dismissed

Judgement

B.P. Das, J.—This Writ Petition is directed against the Judgment dated 30.8.2005 passed by the District Judge-Cum-Election Tribunal, Sundargarh in Election Petition No. 5 of 2003 upholding the election of O.P. No. 1 -Purna Chandra Rout to the office of the Councillor of Ward No. 9 of Rajgangpur Municipality and dismissing the election petition filed by the Petitioner. The Petitioner challenged the election on the ground that the same was invalid, improper and unlawful as O.P. No. 1 was disqualified under Clauses (xvi) and (xvii) of Section 16(1) of the Orissa Municipal Act, 1950 (for short, the "Act") for having more than one spouse living and for having more than two children at the time of filing the nomination paper for the election.

2. Briefly stated, the case of the Petitioner is that election of Councillors of different wards of Rajgangpur Municipality was notified to be held on 19.9.2003, the last date for filing nomination papers being 30.8.2003 and the date of scrutiny of the nomination papers being 2.9.2003. The Petitioner along with O.P. No. 1- Purna Chandra Rout and some others filed their nomination papers for the Office of Councillor of Ward No. 9 of Rajgangpur Municipality. On the date of scrutiny of nomination papers, i.e., 2.9.2003, the Petitioner filed a written objection to the candidature of O.P. No. 1 before the Election Officer, Rajgangpur Municipality (O.P. No. 2) alleging that O.P. No. 1 was disqualified as per 8.16 (1)

(xvi) of the Act for having more than one spouse living. O.P. No. 1 filed an affidavit before the Election Officer stating on oath that he has neither has more than one spouse living nor has he got more than two children. According to the Petitioner, the allegation was false. The Election Officer, on the basis of the said affidavit rejected the objection filed by the Petitioner and held the nomination paper of O.P. No. 1 as valid. The election was held on 19.09.2003 and, O.P. No. 1 was declared elected as the Councillor from Ward No. 9 for having secured the highest number of votes, i.e., 469. The present Petitioner was declared to have lost the election for having secured less number of votes, i.e., 350.

3. The Petitioner filed an election petition before the District Judge-cum-Election Tribunal, Sundargarh challenging the election of O.P. No. 1 on the ground that acceptance of the nomination paper of O.P. No. 1 on the date of scrutiny and rejection of the objection of the Petitioner by the Election Officer was unjust, improper and unlawful, and praying for a declaration that the candidature of O.P. No. 1 was invalid and improper as he was disqualified for election as a Councillor of the Municipality and further declaring the Petitioner as the winning candidate. The Petitioner alleged that O.P. No. 1 has two wives; the name of his first wife-Sarojini Rout has been enumerated in the electoral rolls at Serial No. 939 of Ward No. 6 of Rajgangpur Municipality whereas the name of his second wife-Bilasini Rout has been enumerated in the electoral rolls at Serial No. 1024 of Ward No. 9 of the said Municipality. It was further alleged that O.P. No. 1 has got five children through both the wives. Through the first wife Sarojini, O.P. No. 1 was blessed with three children, namely, Kama Rout, Arjun Rout & Puja Rout and through the second wife-Bilasini, O.P. No. 1 was blessed with two children, namely, Rohit Rout and Kitty Rout, and the children were reading in different classes.

4. O.P. No. 1 filed his show cause denying the assertions and allegations made by the Petitioner in the election petition, so also questioning the maintainability of the case. O.P. Nos. 2 and 3, i.e., the Election Officer and the Returning Officer, were set ex parte as they did not contest the case.

5. The Election Tribunal on the pleadings of the parties framed as many as six issues of which Issue No. 5 is the most important and decisive issue which is quoted below:

Issue No. 5. Whether the O.P. No. 1 has got more than one spouse living and was having five children at the time of filing of nomination paper before the Election Officer, in respect of Ward No. 9 of Rajgangpur Municipality?

6. In order to prove his case, the Petitioner examined as many as eight witnesses and exhibited even number of documents which included the entries in the birth register, delivery register, school admission register of the children, the cancelled transfer certificate, relevant entries in the admission registers and electoral rolls of the years 1995 and 1990. Similarly, O.P. No. 1 in support of his case examined three witnesses and exhibited the relevant entries in the voters''

list of the year 2003 in respect of Ward No. 9 of the Municipality.

7. The Tribunal after evaluating the evidence on record answered Issue No. 5 in the negative holding that the Petitioner failed to establish that Sarojini Rout was the legally married wife of O.P. No. 1 and dismissed the election petition filed by the Petitioner by the Judgment dated 30.8.2005. Hence, this Writ Petition.

8. At the outset, it would be profitable to notice the relevant provisions of Sub-Section (1) of Section 16 of the Act, which are quoted hereunder:

16. Disqualification of candidates for election-(I) No person shall be qualified for election as a councillor of a Municipality if such person-

XXX XXX XXX (xvi) has more than one spouse living; or

(xvii) has more than two children.

Provided that the disqualification under Clause (xvii) shall not apply to a person who has more than two children on the date of commencement of the Orissa Municipal (Amendment) Act, 1994, or as the case may be, within a period of one year of such commencement, unless he begets and additional child after the said period of one year.

9. Learned Counsel for the Petitioner strenuously argues that even though voluminous credible evidence both oral and documentary, was led before the Tribunal, the Tribunal wrongly evaluated such evidence and arrived at a finding, which he could not have.

10. According to the Petitioner, O.P. No. 1-Purna Chandra Rout was residing with his parents in Ward No. 13 of the Municipality and he married Sarojini Satnami, the daughter of Biswambar Satnami, in Ghoghar temple in the year 1989 whereafter he shifted and settled with his wife at Bagichapada in Ward No. 6. They were blessed with three children, namely, Kama, Arjun and Puja on 23.5.1990, 3.6.1996 and in 1997 respectively. Kama was admitted to Bagichapada U.P. School on 31.7.1995 and on 18.06.2002, he took his school leaving certificate and admitted to Rastriya Vidyalaya, Rajgangpur on 1.7.2002. The second son-Arjun was admitted to Bagiphgpada Primary School on 10.7.2001. The third child-Puja was admitted to Anganwadi Center, Rajgangpur. In the respective admission registers of the schools, the name of Purna Chandra Rout was recorded as the father of the three children. In this regard, Purna Chandra Bariha and Nilamani Patel, the Headmaster and Asst.Teacher respectively of Rastriya Vidyalaya, Rajgangpur, were examined as P.Ws. 3 & 4, and Pitabas Mallick, the Headmaster of Bagichapada U.P. School, Rajgangpur, was examined as P.W. 5. PW-5 deposed that Kama Rout and Arjun Rout sons of Sarojini Rout and Purna Chandra Rout had taken admission in the school. P.W. 5 stated that Arjun was still reading in the school and his father Purna Chandra Rout, who was then working as Vice-Chairman of Rajgangpur Municipality, never came to the school in connection with the affairs of Arjun. P.W. 5 in his cross-examination stated that he had never seen the parents of Kama and Arjun

coming to the school. P.W. 3, the Headmaster of Rastriya Vidyalaya, Rajgangpur, in his deposition stated that Kama Rout, son of Sarojini Rout and Purna Chandra Rout of Bagichapada, Rajgangpur, took admission in his school in Class-VI on 1.7.2002 and that at the time of admission, the signature of the parents or any local guardian accompanying the child was obtained in the admission register. In his cross-examination, he stated that the entries had not been made in his presence and the entries had been made basing solely on Ext. 4, the cancelled transfer certificate. P.W. 3 also stated that one Shiva Narayan Razak had signed as the local guardian of the child. P.W. 4, the Asst. Teacher of Rastriya Vidyalaya, Rajgangpur, where Kama Rout, son of Purna Chandra Rout and Sarojini Rout, took admission, stated in his cross-examination that on the date of admission, the parents of Kama Rout did not accompany him and he could not identify the parents of the students of the school and the person, who had accompanied the child to the school, was asked to sign on the register as the guardian.

11. Thereafter, the Petitioner banks on the evidence of P.W. 1, Dr. R.A. Kedia and P.W. 2, Dr. Asha Kiran Kujur. P.W. 1 was the Doctor, who was running "Kedia Nursing Home" at Rajgangpur and deposed that a male child to Bilasini Rout, wife of Purna Chandra Rout was born on 5.5.1999 and he attended the delivery of that child, and the same had been entered in the birth register of the nursing home, Ext. 1. P.W. 2 who was running a private nursing home at Rajgangpur deposed that on 6.5.1998 a baby boy was born to Bilasini Rout w/o Purna Chandra Rout and she personally supervised that delivery. Banking on the evidence of the two Doctors, Learned Counsel for the Petitioner strenuously argues that there is no iota of doubt that O.P. No. 1-Purna Chandra Rout married Bilasini Rout and had two children through Bilasini. This fact is also not disputed by O.P. No. 1. But the question for consideration before the Tribunal was whether Sarojini Rout was the married wife/spouse of Purna Chandra Rout and whether the three children of Sarojini were born through Purna Chandra Rout. There is no documentary evidence as regards the birth of these three children through Sarojini save and except the entries in the school admission registers where admittedly there was no signature of Purna-O.P. No. 1. Purna categorically denied his marriage with Sarojini. Now, the other witness on whom the Petitioner depends is the co-villager, namely, Jitendra Narayan Das (P.W. 6). He stated in his evidence that Purna Chandra Rout had two wives. His first wife Sarojini, was residing at Bagichapada of Rajgangpur, Purna had three children through Sarojini, namely, Kama, Arjun and Puja. Bilasini is the second wife of Purna and was residing near his house at I.T. Colony. P.W. 6 could not be able to tell the names of the two children of Bilasini. P.W. 6 also stated that he had attended the first marriage of Purna with Sarojini, which was solemnized at Ghoghar temple about 14 to 15 years back. Admittedly, P.W. 6 Jitendra Narayan Das, who was an advocate, in his cross-examination, failed to say the date of first marriage of Purna in Ghoghar temple as well as the name of the priest who presided over the said marriage ceremony. He also denied his knowledge in his cross-examination regarding the second marriage of Purna with Bilasini. Similarly, the Petitioner-

Suresh Barik, who was examined as P.W. 7 stated that Purna had two wives and through Sarojini he had three children and through Bilasini he had two children. The electoral rolls of 1995 and 1990 produced by P.W. 7 were marked as Exts. 7 & 8. In Ext. 7 Sarojini was shown as wife of Purna Rout and Ext. 8 shows that one Sarojini Rout wife of Purna. In his cross-examination, he stated that Purna married Sarojini at Ghoghar, which he attended along with many others, but failed to say the exact date, month and year of that marriage. He stated that he did not remember the names of the invitees. In his cross-examination he also stated that in the electoral roll of 1995 (Ext 7), against the name of Sarojini her husband name has been mentioned as Purna Rout whereas in the electoral roll 1990, (Ext. 8), her husband name has been mentioned as Purna. In the case of Bilasini it has been written as Purna Chandra Rout and according to him Purna Rout and Purna Chandra Rout is one and the same person, who had married two women, namely, Sarojini and Bilasini. P.W. 8 Rebati Nandan Agrawal, who claimed to have attended the marriage ceremony of Purna Chandra Rout with Sarojini about 15 to 16 years back in Ghoghar temple, stated in his cross-examination that though he says that Sarojini's father and mother had given "Kanya Dan", he does not know their names and it is stated that Purna personally invited him. In this background, rebuttal evidence was adduced by Purna. The most important witness is the brother of Sarojini, Sutam Satnami, i.e., O.P.W. 3. He has stated that his sister Sarojini Satnami had eloped with one Purna Rout when he was 16 years and blessed with two male child and one female child through Purna Rout. But this Purna Rout was officiating as Vice-Chairman "of Rajgangpur Municipality and not said Purna Chandra Rout. He withstood the rigors of cross-examination, and the Petitioner failed to elicit anything to falsify the statement in chief. But from the evidence it is clear that Indu Satnami, who has been described as the local guardian of the pupil in Ext. 6, which is the admission register of Arjun Rout, whose mother's name has been described as Sarojini Rout and his guardian name in the column of Mother/Father/Guardian one Indu Satnami has signed, who is stated to be the sister of Sarojini. Said Indu Satnami has not been examined nor Sarojini.

12. Learned Counsel for the Petitioner submits that u/s 50 of the Indian Evidence Act, 1872 when the Court has to form an opinion as to the relationship of one person with another, the Opinion, expressed by the conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact. In this context, we may refer to a decision of the Apex Court in the case of *Dolgobinda Paricha Vs. Nimai Charan Misra and Others*, wherein while referring to Section 50, the Apex Court has held:

On a plain reading of the Section it is quite clear that it deals with relevancy of a particular fact. It states in effect that when the Court has to form an opinion as to the relationship of one person to another the opinion expressed by conduct as to the existence of such relationship of any person who has special means of knowledge on the subject of that relationship is a relevant fact. The two

illustrations appended to the Section clearly bring out the true scope and effect of the Section. It appears to us that the essential requirements of the Section are-(1) there must be a case where the Court has to form an opinion as to the relationship of one person to another; (2) in such a case, the opinion expressed by conduct as to the existence of such relationship is a relevant fact; (iii) but the person whose opinion expressed by conduct is relevant must be a person who as a member of the family or otherwise has special means of knowledge on the particular subject of relationship; in other words, the person must fulfill the condition laid down in the later part of the Section. If the person fulfills that condition then what is relevant is his opinion expressed by conduct. Opinion means something more than mere retailing of gossip or of hear say; it means Judgment or belief, i.e., a belief or a conviction resulting from what one thinks on a particular question. Now, the "belief" or conviction may manifest itself in conduct or behaviour, which indicates the existence of the belief or opinion. What the Section says is that such conduct or outward behaviour as evidence of the opinion held is relevant and may, therefore, be proved. We are of the view that the true scope and effect of Section 50 of the Evidence Act has been correctly and succinctly put in the following observations made in Chandu Lal Agarwalla, Karta of joint family and of firm named Hanutram Lekram Agarwalla and Another Vs. Bibi Khatemonnessa and Others, .

It is only opinion as expressed by conduct which is made relevant. This is how the conduct comes in. The offered item of evidence is "the conduct", but what is made admissible in evidence is "the opinion", the opinion as expressed by such conduct. The offered item of evidence thus only moves the Court to an intermediate decision: its immediate effect is only to move the Court to see if this conduct establishes any "opinion" of the person, whose conduct is in evidence, as to the relationship in question. In order to enable the Court to infer "the opinion", the conduct must be of a tenor which cannot well be supposed to have been willed without the inner existence of the "opinion".

When the conduct is of such a tenor, the Court only gets to a relevant piece of evidence, namely, "the opinion of a person". It still remains for the Court to weigh such evidence and come to its own opinion as to the "factum probandum" - as to the relationship in question".

We also accept as correct the view that S.50 does not make evidence of mere general reputation (without conduct) admissible as proof of relationship: AIR 1937 201 (Privy Council) .

13. This decision was also followed by this Court in the case of Vaikuntam Mamikyamma v. Puppala AIR 1971 Ori 49. Apart from that, P. Ws. 6 & 8 as well as the Petitioner, i.e., P.W. 7, in their evidence stated that they had attended the marriage of Puma Chandra Rout (O.P. No. 1) with Sarojini Rout. But the Tribunal did not accept the same as, according to Tribunal, the evidence of the aforesaid witnesses does not repose confidence to come to a conclusion that Sorojini was the married wife of O.P. No. 1. In view of such evidence, the question of

applicability of Section 50 of the Evidence Act does not arise at all. The Apex Court's observation, which we have quoted hereinbefore, also gives a detailed circumstance under which Section 50 shall be applicable. The foremost question that arises for consideration before this Court is whether in such a case this Court while exercising its power under Article 227 of the Constitution of India can scan the evidence and re-evaluate the same and topsy-turvy the findings of the Election Tribunal. In this respect, we may refer to the decision of the Apex Court in the case of Syed Yakoob Vs. K.S. Radhakrishnan and Others, , wherein the Apex Court held that where it is manifest or a clear conclusion of law recorded by an inferior Court or Tribunal is based on an obvious misinterpretation of the relevant statutory provision, or sometimes in ignorance of it, or may be even in disregard of it, or is expressly founded on reasons which are wrong in law, the said conclusion can be corrected by a writ of Certiorari. In all these cases the impugned conclusion should be so plainly inconsistent with the relevant statutory provision that no difficulty is experienced by the High Court in holding that the said error of law is apparent on the face of the record. Applying the aforesaid principles, we are not inclined to* interfere and disturb the finding of the Election Tribunal.

The Writ Petition is accordingly dismissed.

A.K. Samantaray, J.

14. I agree.