

THE HIGH COURT OF ORISSA : CUTTACK
(Original Jurisdiction Case)

O.J.C.No.2670 OF 2002

In the matter of

An application under Article 226 of the Constitution of India, 1950.

A N D

Smt. Tilatamia Bhatra

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PETITIONER

-versus-

1. State Election Commission, Orissa
2. Election Officer, Nandahandi, Dist. Nawarangpur.
3. Rajeswari Pujari

OPP.PARTIES

For petitioner: M/s A.K. Ray, S.Ray, S. Dey,
A.Mohanty and S. P. Das.

For Opp.Parties Mr. A.K. Mishra
(for opposite Party No.1)

PRESENT:

THE HONOURABLE THE CHIEF JUSTICE MR. P.K. BALASUBRAMANYAN
AND
THE HONOURABLE MR. JUSTICE PRADIP MOHANTY.

Date of order : 29.01.2003

P.K. BALASUBRAMANYAN, C.J.: As per notification dated 10.1.2002, the State Election Commission, Orissa called upon all the Grama panchsyats in the State to elect Ward Members and Sarpanches for the purpose of constituting the Grama Panchayats . The said notification also set down the schedule of election from the commencement of the issue of the notice by the Election Officer under rule 24 of the Orissa Grama Panchayats Election Rules, 1965 till publication of the name of the duly elected Naib Sarpanch. what is relevant for our purpose is to note that 22.1.2002 was fixed as the date for scrutiny of nominations under Rule 29 of the Orissa Grama Panchayats Election Rules, (hereinafter referred to as the 'Rules') and 23.1.2002 was fixed as the date for publication of the list of the validly nominated candidates under Rule 32(1) of the Rules. withdrawal had to be done by 25.1.2002, and publication of the final list of contesting candidates was to be published on 25.1.2002. The declaration of

result of Sarpanch and the Ward Members under Rule 51 of the Rules was to be made on 28.2.2002.

2. In Dahana Grama Panchayat, pursuant to the notification above, three nominations were received by the Election Officer, for election to the office of Sarpanch. At the time of scrutiny on 21.1.2002, one of the candidates withdrew her nomination. The nomination of opposite party no.3, the second candidate was rejected on the ground that she was unable to read and write Oriya, a qualification prescribed by Section 11 of the Orissa Grama Panchayats Act, 1964 (hereinafter referred to as the 'Act'). Thus, the petitioner whose was the third nomination was alone left in the fray. The Election Officer declared the petitioner elected in terms of Rule 31 of the Rules on the basis that the nomination of the petitioner was the only valid nomination.

3. It is seen that opposite party no.3 herein, whose nomination was rejected on the ground that she was not qualified to contest in terms of Section 11 of the Act, made a complaint to the Collector by way of an application, questioning the rejection of her nomination on the ground that she was unable to read and write Oriya. The complaint was apparently made on 4.2.2002. The Collector appears to have instructed the Additional District Magistrate, Nawarangpur over telephone to make an enquiry. The Additional District Magistrate proceeded on 6.2.2002 to Nandahandi block for making the enquiry. Not finding the complainant at the spot, the Additional District Magistrate returned. Apparently he did not issue any notice of his enquiry or the purpose of his enquiry to the declared candidate, the petitioner herein. It is seen that the Additional District Magistrate then issued a notice to the complainant, opposite party no.3, informing her that the enquiry into her complaint would be conducted at 3 PM on 7.2.2002 at Block Office, Nandahandi. He handed over that notice to the Block Development Officer with a direction to that Officer to serve it on the complainant. But, on 7.2.2002 at about 1 P.M., the complainant, opposite party no.3, appeared before the Additional District Magistrate and requested him to conduct the enquiry from his chamber, instead of in the block office, Nandahandi since she apprehended some disturbance at the block office if the enquiry was held there. Even at that stage, the Additional District Magistrate did not think it necessary or proper to issue a notice to the successful candidate who had been declared elected by the Election Officer in terms of rule 31 of the Rules. The Additional District Magistrate proceeded to gather information from the complainant, opposite party no.3 herein, and to record her statement. He concluded "My enquiry revealed that the petitioner Rajeswari Pujari is able to read Oriya letters of bigger size but not able to read small and united letters (JUKTAKHARA). She is able to write her name and also letters copied from printed book." The Additional District Magistrate submitted his enquiry report, Annexure C/1, on the same day, i.e. 7.2,2002. The said report was sent to the Collector. The Collector in his turn forwarded the report on 8.2.2002 to the Secretary of the State Election Commission along with his comments. Apparently, based on the report sent by the Collector, the State Election Commission is seen to have passed the order on 24.2.2002 marked Annexure A/1, cancelling the election to the post of Sarpanch of Dahana Grama Panchayat under Nandahandi Block, stating that having considered the report of the Collector, Nawarangpur, the State Election Commission thereby cancelled the election to the post of Sarpanch of Dahana

Grama Panchayat under Mandahandi Block in exercise of its power under Rule 92E of the Orissa Grama Panchayat Election Rules, 1965 in the interest of free and fair poll. Before taking that decision, the State Election Commission also did not think it necessary to hear the elected candidate, who had been declared elected as Sarpanch in terms of Rule 31 of the Rules. Pursuant to this order of the State Election Commission, the Election Officer, Nandahandi, issued Annexure-1 communication to the petitioner herein, the candidate declared elected, informing her that her election as Sarpanch of the Dahana Grama Panchayat has been cancelled. Thereupon, the petitioner has approached this Court with the present writ petition challenging Annexure-1 communication and the cancellation of her election as Sarpanch of Dahana Grama Panchayat.

4. Learned counsel for the petitioner submitted that when, on scrutiny of the nomination papers on 22.1.2002, it was found that the nomination of the petitioner was the only valid nomination, the Election Officer had declared her elected as enjoined by Rule 31 of the Election Rules and once such a declaration of the result is made, the election of the petitioner could be called in question only by way of an Election Petition as enjoined by Section 30 of the Act and as prescribed by Section 31 thereof. Counsel submitted that under Rule 92E of the Election Rules, the State Election Commission had no power to declare or to nullify a concluded election or to nullify a declared result on the ground of any alleged irregularity in the rejection of the nomination paper of one of the candidates. He further submitted that Rule 92E had no application to the fact situation and Rule 92E related to maintaining of general fairness in any election and the power could not be used as against individual complaints like the one regarding the rejection of a particular nomination paper. Finally, the learned counsel contended that in any event, the whole process of cancellation was vitiated since at no point of time, the petitioner, who had been declared elected, had any notice of the complaint of the candidate whose nomination was rejected; the enquiry that was allegedly conducted, the report submitted on such enquiry and the decision that was belatedly taken by the State Election Commission.

5. Learned Counsel appearing on behalf of the State Election Commission, sought to meet these contentions with reference to Rule 92E of the Election Rules. Learned counsel contended that as per the election notification issued, the declaration of results was to be on 28.2.2002 and until that date, the State Election Commission continued to have power to declare any election invalid, notwithstanding Section 30 of the Act. Counsel further contended that unless the results are published in terms of Section 15 of the Act, it could not be said that the writ petitioner had been declared elected and before publication of the results of the election in terms of Section 15, the State Election Commission had the power to nullify or cancel an election so as to ensure fairness in the election process. Learned counsel referred to Article 243K of the Constitution of India and submitted that it was the duty of the State Election Commission to ensure free and fair election and if unfairness is seen, whether it be general or in a particular case, the Election Commission has the jurisdiction or authority to nullify the election. The counsel referred to the decision of the Supreme Court in Mahinder Singh Gill and another v. The Chief Election Commissioner, Now Delhi & Ors : AIR 1978 S.C. 851 in support of

his submission that it was the duty of the State Election Commission to ensure a free and fair election. Counsel submitted that no notice need be given to the petitioner either during the enquiry or during the process of taking the decision, Annexure - A/1. Here, what was contemplated was the giving of a post decision hearing to the petitioner which was sufficient in law. Counsel further submitted that on the facts and in the circumstances of the case, the plea of violation of the principles of natural justice had no force.

6. Section 30 of the Act provides that no election to the post of a Sarpanch (with which we are concerned here) held under the Act shall be called in question except by an election petition presented in accordance with the provisions of Chapter V of the Orissa Grama Panchayat Act. Section 31 deals with the presentation of an Election Petition and the subsequent sections deal with the procedure, the grounds available and the manner of trying and disposing of the Election Petition. These provisions appear to be consistent with the analogous provisions in the Representation of the People Act, which also provides for the calling in question of an election only by way of an Election Petition. Under Article- 243K of the Constitution of India, the superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats shall be vested in the State Election Commission. The Orissa Grama Panchayats election Rules, 1965 made in exercise of the powers conferred by Section 150 of the Act read with Section 27 thereof, lays down the Rules governing the holding of the election and the consequences flowing therefrom. Rules 9-A to 92-G inserted with effect from 15.5.2001 provide for contingencies that may arise during the election and confer power on the State Election Commission to act on the complaints received. Rule 92-E provides that if at any time or in any case, it appears to the Commissioner that circumstances exist to his satisfaction that conduct of free and fair election is likely to be or has been affected, the Commissioner may issue general or special order as the circumstances may require, to ensure free and fair election. It is submitted by counsel for the State Election Commission that under Rule 92-E of the Rules, if the State Election Commission felt that there was unfairness in the rejection of the nomination of opposite party no. 3 for election to the post of Sarpanch of the Grama Panchayat, it was the duty of the State Election Commission while ensuring the fairness of the election, to intervene and on that premise the Election Commission had the power to declare the election of the petitioner null and void and that was all that was done in the case on hand. We think that Rule 92-E cannot be read in isolation. Nor can be it read as conferring an absolute power in the State Election Commission to nullify any election, the result of which had been declared. Rule 92-E, Which, after all, is a piece of subordinate legislation, must be read consistent with the provisions of the Act and undivorced from the relevant provisions of the Act. Section 30 of the Act has categorically provided that no election of a person as a Sarpanch held under the Act, shall be called in question except by an Election Petition presented in accordance with Chapter V of the Act. Rule 92-E understood in the context of Section 30 of the Act can at best confer a power on the State Election Commission to cancel an election to a Panchayat or to the post of a Sarpanch or Naib-Sarpanch, before the results of the election are declared or before a candidate is declared elected. Of course, in this case, if there had been a contest, the results could have been declared only by

28.2.2002, as per the notification. The Election Commission could have withheld the declaration of results until he had completed an enquiry. But, in the case on hand, in view of the rejection of the nomination of one of the candidates, and the withdrawal of the nomination of the other, a situation arose which attracted Rule 31 of the Rules. The petitioner before us was left as the sole candidate who had filed a valid nomination. Hence, in terms of Rule 31 of the Rules, the result of the election was declared by the Election Officer as he was empowered to do. Therefore, the election of the petitioner herein had been declared by the duly constituted authority under the Act. In our view, it was not open to the Election Commission thereafter to nullify the election on the complaint of a defeated candidate on the theory of ensuring fairness in the election. In fact, it may be possible to say that the contingency contemplated by Rule 92-E of the Rules is the fairness in the process of election as a whole and it may not be attracted to an individual case of rejection of a nomination or some such conduct or act on the part of a particular Election Officer. For the purpose of this case, we need not go into that question or pronounce on that aspect. We are of the view that on the result of the election is declared, the same could be called in question only by way of an Election petition under Section 31 of the Act. Here, in view of the result having been declared, and the petitioner having been declared elected, the election of the petitioner could not be nullified by the Election Commission. The results of the election having been declared, the State Election Commission had lost its powers under Rule 92-E of the Rules to declare the election of the petitioner invalid. The argument of learned counsel for the State Election Commission based on Section 15 of the Act, in our view, cannot be accepted. The formal publication of the results of the election notified under Section 15 of the Act, in terms of Section 31 of the Act, no doubt operates as the starting point of limitation for the filing of an Election Petition seeking the setting aside of an election. But, that does not mean that until the result is published in terms of Section 15 of the Act, the election process is not complete. The election is complete for the purpose of Section 30 of the Act and Rule 92-E of the Rules, on the results of a particular election being declared by the authority competent in that behalf. Therefore, once the results are declared by the Election Officer, who is competent to do so in terms of the Act and the Rules, the fact that a publication under Section 15 indicating that the petitioner had been elected as the Sarpanch of the concerned Grama Panchayat had not been issued, would not lead to the position that the State Election Commission continued to have jurisdiction to nullify that election. We are, thus, satisfied that the Election Commission has acted without jurisdiction in declaring the election of the petitioner invalid by Annexure A/1 order.

7. There is another substantial aspect in this case. If a complaint is made before the District Collector concerning the improper rejection of the nomination of a candidate and he decides to make an enquiry assuming that the Collector has the power to make an enquiry of this nature is he not bound to give notice of such enquiry to the candidate who had already been declared elected? We have no doubt that he is bound to give such a notice. When the election of a candidate who has been declared elected is to be set aside, certainly, it affects the right of that person to hold the office to which she is declared elected. In other words, her interests or rights are clearly affected by the taking of the decision by the State Election Commission to

nullify her election. When the right of a person is sought to be affected on the basis of an enquiry or investigation, the principles of natural justice require that the said person be given an opportunity to have her say in the enquiry or investigation and only thereafter the decision be taken. We see in the case on hand that opposite party no. 3 made an application before the Collector, notice of which was not given to the petitioner, the candidate declared elected. An enquiry was conducted, of which no notice was given to the elected candidate. The decision making process was gone through by the State Election Commission, again, without any notice to the elected candidate and without giving her an opportunity of being heard. It would have been appropriate for the State Election Commission to give notice of the complaint to the elected candidate and to give her an opportunity to meet the allegations which were enquired into, to participate in the enquiry and to take a decision affecting her election with notice to her. Unless the Statute itself excludes the application of the principle of natural justice, it is well settled, that those principles apply. It is taken that they are written into the statute so as to ensure fairness in dealing with matters of dispute. No provision in the Act or the Rules was brought to our notice which excluded the application of the principles of natural justice which otherwise have universal application. In that situation, we are clearly satisfied that the Collector and the State Election Commission were bound to comply with the requirements of natural justice before making an enquiry into the complaint of opposite party No.3 and before taking decision to cancel the result of the election, by giving an opportunity to the petitioner herein, the elected candidate to participate in the enquiry and in the decision making process. Therefore, on the facts of this case, the order of the State Election Commission is also liable to be struck down on the ground that it is violative of all canons of natural justice. Since we have taken the view as above on the jurisdiction of the State Election Commission, it is not necessary for us to consider the merits or demerits of the rejection of the nomination of opposite party no.3 That has to be decided by the Election Tribunal constituted under Section 31 of the Act.

8. Thus, both on the ground that the State Election Commission had lost its power under Rule 92-E of the Rules (assuming that it has the power) and that in any event, it was bound in law to follow the rules of natural justice, we allow the writ petition and quash the order Annexure - A/1 and the subsequent communication to the petitioner Annexure -1. If opposite party no.3 or any other voter is aggrieved by the election of the petitioner herein, it is for her or him to approach the appropriate forum in terms of Section 31 of the Act.

Sd/-P.K. Balasubramanyam, C.J.
Sd/- Pradip Mohanty, J

Orissa High Court, Cuttack
The 29th January, 2003/R.K.Dash